No. 91-1626

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In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-15046
88-15127
88-15128

D.C. No. CV-86-1343-LKK

CATHOLIC SOCIAL SERVICES, INC., (Centro De Guadalupe Immigration Center); CALIFORNIA COALITION OF WELFARE CENTER FOR IMMIGRANTS RIGHTS, INC.; MERCEDES AGUILAR DE LOPEZ; MARIA TERESA REYES; and SARA ORANTES DE PALACIOS, PLAINTIFFS-APPELLANTS AND CROSS-APPELLEES

v.

RICHARD THORNBURGH, Attorney General of the United States of America, DEFENDANT-APPELLEE AND CROSS-APPELLANT

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

No. 88-6447

D.C. No. CV-87-4757-WDK

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL., PLAINTIFFS-APPELLEES

v.

U.S. DEPARTMENT OF IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Central District of California
William D. Kelier, District Judge, Presiding

Submitted February 5, 1992 *
Filed February 13, 1992

Before: Alfred T. Goodwin, Joseph T. Sneed and Procter Hug, Jr., Circuit Judges.

Opinion by Judge Hug

OPINION

HUG, Circuit Judge:

The Immigration and Naturalization Service ("INS") appeals several district court orders resulting from successful class action challenges by aliens

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* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

and immigration rights groups to the INS's implementation of the Immigration Reform and Control Act of 1986 ("IRCA or "the Act"). In separate district court actions, Catholic Social Services, Inc. ("CSS") and the League of United Latin American Citizens ("LULAC") obtained declaratory and injunctive relief against the INS for its administration of IRCA's legalization program for aliens living illegally in this country. For certain aliens, the injunctions extended the period for filing legalization applications beyond the deadline set by the Attorney General. The United States contends that the district courts lacked jurisdiction under IRCA to hear the suits and that the courts exceeded their authority in extending the application period. CSS cross appeals, contending that the trial court erred in refusing to order the Government to allow all deported class members to reenter the United States to reap the benefits of the deadline extension. We conclude that district courts had jurisdiction and affirm the judgments.

I. *BACKGROUND*

In response to growing concerns over the influx of illegal aliens into the United States, Congress passed IRCA in 1986 as an amendment to the Immigration and Naturalization Act of 1952. IRCA consists of two main parts. One part, not at issue here, imposes sanctions for the employment of undocumented aliens in American businesses. 8 U.S.C. § 1324a (1988). The other part established two provisions under which undocumented aliens could obtain legal resident status. The first provision, also not at issue here, was directed at special agricultural workers ("SAW"). 8 U.S.C. § 1160 (1988). The second provision set up a one-time only legalization program through which aliens could apply for lawful tempo-

rary resident status and thus, after a one-year waiting period, could apply for permanent residency. 8 U.S.C. § 1255a (1988). The program required the alien to have resided continuously and unlawfully in the United States since January 1, 1982, 8 U.S.C. § 1255a(a)(2)(A), and to have been continuously physically present in the United States since November 6, 1986, the date of IRCA's enactment, 8 U.S.C. § 1255a(a)(3)(A). Aliens residing outside the United States could not be admitted to the United States in order to apply for legalization. 8 U.S.C. § 1255a(a)(3)(C). The Act provided that the aliens would have a twelve month period in which to file applications. The Act authorized the Attorney General to set the dates of the application period. 8 U.S.C. § 1255a(a)(1)(A). The Attorney General set the period to run from May 5, 1987, to May 4, 1988. *See* 8 C.F.R. § 245a.2(a)(1) (1988).

A. *The CSS Appeals*

CSS initiated its action in the district court in November 1986 in response to the INS's administration of IRCA's provision concerning casual and innocent absences from the United States. Under IRCA, an alien could enjoy "brief, casual, and innocent absences" from the country without violating the continuous physical presence requirement. 8 U.S.C. § 1255a(a)(3)(B) (1988). In November 1986, in a nationwide telegram to its offices, the INS promulgated an interpretation of section 1255a(a)(3)(B) that required that aliens obtain INS approval, or "advance parole," before taking casual absences. The INS immediately enforced this interpretation and began to apprehend and deport aliens who left the United States after November 6, 1986, without receiving advance parole. CSS went to court to bar the implementation of this regulation.

On November 24, 1986, the district court provisionally certified the case as a class action and issued a temporary restraining order to prevent the INS from deporting aliens who were prima facie eligible for legalization except for an unauthorized absence from the United States. The Government appealed that order to a motions panel of this court and sought a stay. That panel characterized the order as a preliminary injunction and issued a stay pending review. In April 1987, a merits panel of this court declined to address the dispute over the advance parole condition on the grounds that the district court had not had an opportunity to decide the issue or to resolve some factual questions. The panel limited its holding to the conclusion that the trial court had abused its discretion by finding that CSS was likely to succeed on the merits of the absence argument. It reversed the temporary restraining order and remanded the case for further consideration. Within a month of that decision, however, the INS announced that it would apply the advance parole provision only to aliens who departed or wished to depart the country after May 1, 1987. *See* 8 C.F.R. § 245a.1(g) (1991). In light of this change, the panel withdrew its opinion, which focused on the policy of requiring advance parole as of November 1986, but vacated the temporary restraining order and remanded the case without prejudice for further proceedings. *Catholic Social Services, Inc. v. Meese*, 820 F.2d 289 (9th Cir. 1987).

Upon remand, the district court issued an order in May 1988, invalidating the INS's interpretation of section 1255a(a)(3)(B) and enjoining the INS from enforcing it. *See Catholic Social Services, Inc.*

v. Meese, 685 F. Supp. 1149 (E.D. Cal. 1988). On May 3, 1988, the court certified a class of plaintiffs consisting of "all persons prima facie eligible for legalization under INA § 245A [8 U.S.C. § 1255a] who departed and reentered the United States without INS authorization (i.e., "advance parole") after the enactment of IRCA following what they assert to have been a brief, casual and innocent absence from the United States." The Government does not challenge the court's invalidation of the INS's casual absence interpretation or the constitution of the certified class.

Both parties, however, find fault with the remedies ordered by the district court. The court issued its first of three remedial orders in June 1988. In that order the district judge instructed the INS to extend the filing deadline from May 4, 1988 to November 30, 1988, for class members who were deterred from seeking legalization by the INS's casual absences regulation.[1] The court, citing 8 U.S.C. § 1255a(3)(C), refused to order readmission into the country of the subclass members who had been deported or allowed to voluntarily depart. CSS appeals this refusal to readmit class members living outside the United States.

Within days after the filing of the June order, the Supreme Court issued its decision in *Immigration and Naturalization Serv. v. Pangilinan*, 486 U.S. 875 (1988). The Government immediately moved the district court to dissolve the extension of the application deadline on the grounds that it violated *Pangilinan*. When the court had not acted on the motion by

[1] The court chose November 30, 1988, to coincide with the cut-off date under 8 U.S.C. § 1160(a)(1)(A) (1988) for legalization applications from special agricultural workers.

August 8, 1988, the Government withdrew the motion and filed the first of its two appeals.

On August 11, 1988, the trial court entered the second and third of its remedial orders, which took the form of supplements to the June injunction. In the first August order, the court concluded that *Pangilinan* did not invalidate the deadline extension. Acknowledging that its decision might be reversed, however, the court provided for an alternative remedy, which would have prohibited the INS from deporting or removing from the country any class member on grounds related to the CSS litigation and would have obligated the INS to provide class members with permanent work authorization documents. Since we find the extension appropriate, we need not consider the alternative remedy. In the second August order, the court mandated a set of procedures for the INS to use in determining whether an apprehended alien fell under the scope of the June injunction. The Government's second appeal in this case challenges the August orders.

After receiving the three appeals discussed above, we granted first a temporary stay of the original injunction and its supplements, and then a stay for the pendency of the a[illegible]. We also directed the INS to release detained c[illegible] members and grant them temporary work permits until we resolved this case.

Shortly before oral argument, we ordered the parties to brief the impact of IRCA's judicial review provisions, 8 U.S.C. §§ 1255a(f)(1)-(4) on the case. We withdrew submission pending Supreme Court decisions in *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991) and *Ayuda, Inc. v. Thornburgh*, 111 S. Ct. 1068 (1991). We now resubmit the case. The Government contends that those provisions barred

district court jurisdiction over the suits. CSS and LULAC argue that the review provisions have no impact on the trial court's subject matter jurisdiction.

B. *The LULAC Appeal*

The events leading up to LULAC's appeal are considerably less involved than in CSS.[2] LULAC filed its suit in July 1987, challenging the validity of the INS's fraudulent reentry regulation. As noted above, IRCA required an alien seeking legalization to show that he or she had resided continuously and unlawfully in the United States since January 1, 1982. *See* 8 § U.S.C. 1255a(a)(2)(A) (1988). In August 1987, the INS issued 8 C.F.R. § 245a.2(b)(8) (1991), which had the effect of declaring statutorily ineligible for legalization any alien who left the United States and reentered using any sort of fraudulent visa or fraudulent INS documentation. The INS apparently reasoned that reentry by use of a fraudulent but facially valid immigration document was constructively lawful and therefore interrupted the continuous unlawful residency requirement. Several aliens and LULAC sued to invalidate this regulation as contrary to IRCA and the Equal Protection Clause.

In October 1987, before the district court heard the action, the INS changed the fraudulent reentry policy. Under the new policy, announced at 8 C.F.R. §§ 245a.2(b)(9) and (10) (1991), an alien entering under a fraudulent document would be eligible for legalization but had to apply for a waiver excusing

[2] We note that the parties in LULAC stipulated to the dismissal of the organizational plaintiffs. For the sake of convenience, we will continue to refer to the case as "LULAC."

the fraud. The LULAC plaintiffs responded to the change by amending their complaint to seek a declaratory judgment that the original regulation had been invalid.

In July 1988, the district court granted the plaintiffs' motion for class certification and rendered its decision. The court found that the first fraudulent reentry regulation conflicted with IRCA but that the waiver revision was valid. After directing the parties to submit additional briefing on the issue of an appropriate remedy and specifically instructing them to consider the effect of *Immigration and Naturalization Serv. v. Pangilinan*, 486 U.S. 875 (1988), the court ordered a remedy similar to the injunction awarded to CSS. It directed the INS to extend the application deadline from May 4 to November 30, 1988 for aliens in the certified class who qualified for legalization but were deemed ineligible for it under the original reentry policy. In reaching its decision, the court found that it had subject matter jurisdiction and that *Pangilinan* did not bar the extension.

The Government appeals the August order. It challenges both the jurisdiction ruling and the deadline extension. The parties agreed to a stay of the injunction during the pendency of this review.

We consolidated the appeals in CSS and LULAC because they present substantially the same legal issues. We are called upon to decide whether the district courts in these cases had jurisdiction to hear the suits and whether the injunctive remedies they issued can stand. We also address the issue of whether the district court in CSS properly denied reentry to aliens residing outside the country. Our jurisdiction to review the CSS injunction is provided by 28 U.S.C. § 1292(a)(1) (1988). We review the

LULAC order under 28 U.S.C. § 1291 (1988).[3] We consider each issue in turn.

II. *JURISDICTION*

The threshold issue in this case is whether the district courts had jurisdiction to hear the suits filed by CSS and LULAC. CSS and LULAC contend that the district courts had federal question jurisdiction under 28 U.S.C. § 1331. The Government argues that IRCA provisions preclude jurisdiction in this case.

IRCA's provisions for judicial review of legalization determinations are found in 8 U.S.C. § 1255a(f). Administrative and judicial review of a legalization determination can occur only as prescribed by section 1255a(f). 8 U.S.C. § 1255a(f)(1). Section 1255a(f)(2) provides: "No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government." An application denied for other reasons may be reviewed by an administrative appellate

[3] The injunction in CSS does not resolve all the issue in the case, *Catholic Social Services*, 685 F. Supp. at 1151, and therefore reaches us as an interlocutory appeal. The LULAC injunction does dispose of all the issues raised before the trial court. We note, however, that the court in LULAC did not enter a separate judgment pursuant to Fed. R. Civ. P. 58. Since both parties and the district court treated the injunction as the final decision in the case, and neither party objected to the taking of an appeal, we deem the separate-judgment requirement waived and assume jurisdiction under section 1291. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386-88 (1978).

authority, 8 U.S.C. §1255a(f)(3)(A), and then by a court of appeals, 8 U.S.C. § 1255a(f)(4)(A).[4]

The Supreme Court's holding in *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991), is instructive. In *McNary* the Supreme Court considered the IRCA review provisions for special agricultural workers ("SAW"). Those SAW review provisions, as set forth in 8 U.S.C. § 1160(e),[5] are substantially the

[4] Under 8 U.S.C. § 1255a(f)(4)(A), judicial review is governed by 8 U.S.C. § 1105a. Section 1105a states that review (of a denial) is available in federal courts only after the alien has exhausted all administrative remedies. 8 U.S.C. § 1105a(c). Administrative appellate review of legalization determinations is based solely upon the administrative record and upon additional or newly discovered evidence that was not available at the time of the determination. 8 U.S.C. § 1255a(f)(3)(B). Judicial review is based solely upon the administrative record established at the time of the administrative appellate review unless the applicant establishes that there was an abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record as a whole. 8 U.S.C. § 1255a(f)(4)(B).

[5] Section 1160(e) provides:

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of such a determination.

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application

same as the review provisions at issue in the instant case except that the SAW review provisions do not have a timely application provision. In *McNary*, the action alleged a pattern or practice of due process violations by the INS in its administration of the SAW program. 111 S. Ct. at 893-94. The Government argued that the judicial review provisions precluded the district court from exercising general federal question jurisdiction over the action. *Id.* at 896. The Court held that review was permissible because the review provisions applied "only to review of denials of *individual* SAW applications." *Id.* at 897 (emphasis added).

The *McNary* Court's decision was based on "the absence of clear congressional language mandating preclusion of federal jurisdiction." *Id.* at 892. The Court explained:

> The critical words in § 210(e)(1), however, describe the provision as referring only to review "of *a determination* respecting *an application*"

> and upon such additional or newly discovered evidence as may not have been available at the time of the determination.
>
> (3) Judicial review
>
> (A) Limitation to review of exclusion or deportation
>
> There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title.
>
> (B) Standard for judicial review
>
> Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

> for SAW status (emphasis added). Significantly, the reference to "a determination" describes a single act rather than a group of decisions or a practice or procedure employed in making decisions. Moreover, when § 210(e)(3), see 8 U.S.C. § 1160(e)(3), further clarifies that the only judicial review permitted is in the context of a deportation proceeding, it refers to "judicial review of *such a denial*"—again referring to a single act, and again making clear that the earlier reference to "a determination respecting an application" describes the denial of an individual application.

Id. at 896.

The Court continued:

> This reading of the Reform Act's review provision is supported by the language in § 210(e)(3)(B) of the INA, which provides that judicial review "shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole." 8 U.S.C. § 1160(e)(3)(B). . . . Because the administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action, limiting judicial review of these claims to the procedures set forth in § 210(e) is not contemplated by the language of that provision.

Id. at 896-97.

The Court recognized "that had Congress intended the limited review provisions of § 210(e) of the INA to encompass challenges to INS procedures and practices, it could easily have used broader statutory language." *Id.* at 897.

All of the court's considerations in *McNary* apply with equal force in the instant case. The references in § 1255a(f) to "a determination respecting an application," 8 U.S.C. § 1255a(f)(1), and to a "denial of adjustment of status," 8 U.S.C. § 1255a(f)(2), are relevant to an individual legalization determination, but not to a case such as this one where the INS's regulations are being challenged. Moreover, the administrative record and appeals process would be of no help in addressing the constitutional and statutory claims brought in this case. If Congress wanted the IRCA review provisions to apply to challenges of INS regulations implementing IRCA, it could have used broader statutory language.

The Government urges us to follow the D.C. Circuit's recent decision in *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742 (D.C. Cir. 1991). We decline to do so. The D.C. Circuit addressed the same jurisdictional issues presented in this case. The Supreme Court had vacated the D.C. Circuit's original decision in *Ayuda* and remanded the case for reconsideration in light of *McNary*. *See Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989), *vacated and remanded*, 111 S. Ct. 1068 (1991). On remand, the D.C. Circuit held that the district court's jurisdiction was barred by 8 U.S.C. § 1255a(f)(1) and 8 U.S.C. § 1255a(f)(2). 948 F.2d at 759. In a well-reasoned opinion, Judge Wald dissented. *Ayuda*, 948 F.2d at 760 (Wald, J., dissenting).

In reaching its decision, the *Ayuda* majority concluded that *McNary* does not draw a distinction between individual and class-wide claims, but instead draws "a distinction between collateral issues (which might normally be procedural) and those that go to the heart of an applicant's claim." *Id.* at 749. We find no basis for such an interpretation of *McNary*. The Supreme Court in *McNary* did not draw a distinction between collateral issues and issues that go to the heart of the claim.

The Court did, however, hold that IRCA's SAW review provisions apply "only to review of denials of *individual* SAW applications."[6] *McNary*, 111 S. Ct. at 897 (emphasis added). As discussed above, the review provisions in section 1255a(f) refer only to determinations of individual applications. We therefore hold that section 1255a(f) does not apply to this case.

III. *EXTENDING THE TIME PERIOD FOR AMNESTY APPLICATIONS*

The Government contends that the court's equitable powers do not include the power to extend the time period for applying for amnesty. In support of its

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[6] The D.C. Circuit's majority opinion is partly based on the fact that *McNary* was not concerned with 8 U.S.C. § 1255a(f)(2). Section 1255a(f)(2) is not relevant to the instant case. Section 1255a(f)(2) states, "No *denial of adjustment* of status under this section based on a late filing of an *application* for such adjustment may be reviewed by a court of the United States or of any State or reviewed in an administrative proceeding of the United States Government." 8 U.S.C. § 1255a(f)(2) (emphasis added). Like the other IRCA provisions, the language of section 1255a(f)(2) contemplates an *individual* determination of an alien's application. In the instant case an individual denial of application is not at issue. Section 1255a(f)(2) is therefore inapposite.

argument, the Government relies on *Immigration and Naturalization Serv. v. Pangilinan*, 486 U.S. 875 (1988). In *Pangilinan*, sixteen Filipino nationals who served with the United States Armed Forces during World War II sought United States citizenship pursuant to sections 701 to 705 of the Nationality Act of 1940, Ch. 876, 54 Stat. 1137, as amended in 1942 by the Second War Powers Act, Ch. 199, 56 Stat. 182, *codified at* 8 U.S.C. §§ 1001-1005 (repealed 1952). The amended Act provided lenient rules for naturalizing aliens who served in the United States Armed Forces during World War II. Section 702 authorized representatives to receive petitions, conduct hearings and grant naturalization outside of the United States. In August 1945, a representative was designated to naturalize aliens in Manila. *Pangilinan*, 486 U.S. at 879. In October 1945, the Manila representative's authority was revoked. *Id.* at 879-80. Although naturalization officers were continuously available outside of the Philippines, a new representative was not appointed to Manila until August 1946. The new representative naturalized approximately 4,000 Filipinos before the Act's expiration on December 31, 1946. *Id.* at 880. Over thirty years later, the plaintiff Filipinos sought naturalization under the expired 1940 Act even though they had not applied for naturalization before the Act's expiration date. *Id.* The Supreme Court held that naturalization of the Filipino plaintiffs would not be an appropriate equitable remedy. *Id.* at 885.

The Government's reliance on *Pangilinan* in the present case is misplaced for several reasons. First, unlike that in *Pangilinan*, the remedy ordered by the district courts here is not naturalization. The Supreme Court's decision in *Pangilinan* was primarily

based on its conclusion that "the power to make someone a citizen of the United States has not been conferred upon the federal courts, like mandamus or injunction, as one of their generally applicable equitable powers." *Id.* at 883-84. The district court's orders here do not purport to grant citizenship to anyone. They simply order the INS to consider applications. As the Supreme Court recognized in *McNary*:

> [T]he individual respondents in this action do not seek a substantive declaration that they are entitled to SAW status. Nor would the fact that they prevail on the merits of their purportedly procedural objections have the effect of establishing their entitlement to SAW status. Rather, if allowed to prevail in this action, respondents would only be entitled to have their case files reopened and their applications reconsidered in light of the newly prescribed INS procedures.

McNary, 111 S. Ct. at 898. *See also Ayuda*, 948 F.2d 766 (Wald, J., dissenting) ("These petitioners are not seeking an ultimate determination of their eligibility for legalization, only a ruling that they could not be turned away at the door. . . .").

Second, in contrast to *Pangilinan*, extending the application time here effectuates, rather than frustrates, the public policy established by Congress. In *Pangilinan*, the expiration date was part of section 702. 486 U.S. at 882. Congress clearly intended that applications not be accepted after the December 31, 1946, expiration date. Therefore, extending the deadline in *Pangilinan* would have frustrated congressional intent. *Id.* at 883. Congressional intent was followed because the plaintiffs had "ample opportu-

nities," *id.* at 885, to apply for naturalization before the expiration date.

In IRCA, Congress did not provide a specific cutoff date for amnesty applications. The Act establishes a twelve-month period for aliens to apply for amnesty. 8 U.S.C. § 1255a(a)(1)(A). It does not contain a specific deadline. Moreover, the Judiciary Committee intended "that the legalization program should be implemented in a liberal and generous fashion." H.R. Rep. No. 99-682 (I), 99th Cong., 2d Sess. 72 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5649, 5676. Thus, Congress clearly intended for illegal aliens to have ample and meaningful opportunities to apply for adjustments of status. The members of the plaintiff class did not have such opportunities because the INS's interpretation of the "brief, casual and innocent" provision was not invalidated until the Attorney General's deadline had almost expired.

Furthermore, in *Pangilinan*, the Court found that Congress clearly chose not to extend the deadline for Filipinos who had not been naturalized before the 1940 Act's expiration date. When Congress enacted a new citizenship program in 1948, it excluded Filipino servicemen and specifically provided that applications that were still pending would be adjudged under the new provisions. Act of June 1, 1948, ch. 360, 62 Stat. 281. *See Pangilinan*, 486 U.S. at 884.

In contrast to *Pangilinan*, Congress's decision not to extend the amnesty deadline set by the Attorney General was not intended to prevent the class members from applying for adjustments of status after the Attorney General's deadline. Congress was aware of the plight of persons like those in the plaintiff class when it voted to deny the extension. The members of Congress chose not to grant a general extension because they believed that the courts could provide an

equitable remedy. Senator Grassley, an outspoken opponent of the extension, argued:

> [T]he proponents argue that certain court decisions recently handed down now make some 75,000 persons eligible for the legislation program. There may very well be equitable reasons to allow these individuals to apply; but there is no doubt that the courts are well equipped to evaluate equitable considerations. The Senate need not enact a broad extension to accommodate certain litigants.

134 Cong. Rec. S5037-01.

The INS misinterpreted IRCA and the plaintiffs acted quickly to remedy the misinterpretation. Congress intended for aliens to have a twelve-month period in which to apply for legalization and specified that the legalization program be implemented in a liberal and generous fashion. The INS's erroneous interpretation of the Act in reality deprived the aliens of the full twelve-month application period Congress had provided for them. It would be contrary to congressional intent to foreclose these aliens' applications. The equitable remedy provided by the two district courts is appropriate. Because the initial time period provided in the injunctions has expired, the actions are remanded to the district courts to revise the injunctions to provide an equivalent extension of the application period.

IV. *THE CROSS-APPEAL*

The district court denied an injunction ordering the Government to permit class members outside the United States to enter the United States in order to file applications for adjustment of status. Catholic

Social Services appeals that decision. We affirm the denial.

The Government bases its opposition to the injunction on 8 U.S.C. § 1255a(a)(3)(C). That section of IRCA states: "Nothing in this Section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection." Thus, although the statute does not authorize admission to the United States, it does not prohibit admission either. Therefore, section 1255a(a)(3)(C) does not provide a basis for our decision.

We do not know whether all of the class members are eligible for admission to the United States. Congress has established eligibility requirements for admission into the United States. *See* 8 U.S.C. § 1182. If we were to allow all of the class members to enter the United States, the admission of some of the aliens might violate the admission requirements. We have no way of knowing whether each of these class members is eligible for admission under these requirements. We therefore do not decide whether any class member is eligible for admission.

Moreover, some of the class members have been deported. If we were to order admission of these aliens, we would, in effect, be reviewing and reversing their deportation orders. As a general rule, we may not review deportation orders of aliens who have departed the United States after the order has been issued, although there are some exceptions. *See, e.g., Wiedersperg v. Immigration and Naturalization Serv.*, 896 F.2d 1179 (9th Cir. 1990) (alien could reopen ~~deportation~~ proceedings after the conviction that was the basis for his deportation was vacated, since the departure therefore was not legally executed). We do not know whether any class member is eligible to challenge his or her deportation order under an exception to this general rule, and we express no opinion in this regard.

THE JUDGMENTS ARE: AFFIRMED AND REMANDED FOR ADJUSTMENTS OF TIME PERIODS SPECIFIED IN THE INJUNCTIONS.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Civ. S-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC.
(CENTRO DE GUADALUPE IMMIGRATION CENTER),
ET AL., PLAINTIFFS

v.

EDWIN MEESE, III, ETC., DEFENDANT

[Filed June 10, 1988]

The court has ordered further briefing on the question of what remedies are available to members of Subclass 1 and whether a stay of this court's orders should be granted.

It is apparent to the court that this court's equitable powers are sufficient to require the defendant to comply with the order appended hereto. The Congress intended that members of the subclass have one year to file, *see* 8 U.S.C. § 1255a(a)(1)(A); because of defendant's conduct, they were deprived of that right. Because defendant must accept SAW applications through November 30, 1988, the burden on the government in accepting and processing applications from Subclass 1 members is reduced.

Relative to Subclass 1 members who are no longer in the United States by virtue of deportation or so-called voluntary departures, plaintiffs propose as proper relief essentially that they be readmitted. This court concludes that such relief is inappropriate. The statute provides "[n]othing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection." 8 U.S.C. § 1255a(a)(3)(C). This section expresses a clear congressional policy; it appears inappropriate in framing relief for the government's failure to comply with one expression of congressional intent, to order conduct violative of another clear expression of congressional policy. Moreover, in significant part, the present plight of those outside the country exists because a motion panel of the Ninth Circuit precipitously, and apparently without full consideration of the consequences, first stayed and then vacated this court's temporary restraining order which, if it had been in effect, might have limited the number of persons in the subject category. The motion panel's conduct must be seen as in some sense an intervening cause of the absence from the country of those persons who are the subject of this paragraph. Given that fact, and in light of the clear congressional policy prohibiting admission for the purpose of applying for legalization, the remedy sought is inappropriate. With great reluctance, this court concludes that readmission for the purpose of righting the government's wrong contradicts congressional policy and I must decline to order it.

The question of the stay is equally problematic. I cannot but admit that the legal issues involved in this case may well be overshadowed by perceptions of

the social consequences of IRCA and of this court's opinion in the matter at bar. Under such circumstances, the result on appeal is uncertain. On the other hand, the Ninth Circuit's vacation of this court's previous temporary restraining order demonstrates the enormous consequence, including unforeseen consequences, of not having an injunction in place. In all, although at oral argument the court indicated a willingness to stay its injunction so as to permit orderly disposition, that course now seems inappropriate. Members of the subclass continue to be deported and rendered subject to voluntary departure. Moreover, plaintiffs' very labored proposed stay order demonstrates how very complex an order would be required, the effect of which, given the complexity, would be uncertain. Accordingly, the request for a stay will be DENIED.

For all of the above reasons heretofore expressed, IT IS HEREBY ORDERED that:

1. Defendant shall process all applications filed by plaintiffs and Subclass 1 members on or before May 4, 1988, in a manner consistent with this court's order of May 3, 1988.

2. Defendant shall identify through his records all Subclass 1 members whose applications for legalization under the Immigration and Nationality Act ("INA") § 245A were denied or recommended for denial because of application of 8 C.F.R. § 245a.1(g), and shall rescind such denials or recommended denials, including those applications that have been, are, or will be appealed pursuant to 8 C.F.R. § 245a.2(p), and readjudicate such applications in a manner consistent with the court's order of May 3, 1988. Defendant shall provide notice to such Subclass 1

members that their applications have been reopened pursuant to this court's order and if such class members have a prima facie claim to legalization, they shall be provided a stay of deportation and temporary employment authorization pending final adjudication of their applications.

3. Defendant shall accept for filing at INS Legalization offices legalization applications proferred by Subclass 1 members on or before November 30, 1988, or, if defendants seek and are granted a stay of this order, and if this court's order is thereafter affirmed by the Ninth Circuit, for a period of 180 days after such affirmance.

4. Within 15 days of the effective date of this order, the INS shall file and serve proposed procedures and guidelines setting forth the evidentiary requirements and standards of proof to be imposed on Subclass 1 members in order to demonstrate (a) that they knew of the defendant's unlawful regulation and thereby concluded that they were ineligible for legalization and by reason of that conclusion did not file an application, and (b) that their absence from the country was "brief, casual and innocent." Plaintiffs shall have 10 days thereafter to respond to the procedures and guidelines proposed by INS.

In the interim, the INS will, and as an alternative to filing proposed guidelines and procedures, may thereafter accept applications accompanied by the applicant's sworn declaration stating (1) that the applicant was absent from the United States for a brief period on or after May 1, 1987, and returned other than pursuant to INS advance parole, (2) how the applicant was aware of the INS regulation, 8 C.F.R. § 245a.1(g), or the agency policy pursuant thereto and therefore reached the conclusion of ineligibility

for legalization, and (3) based upon such belief of ineligibility, did not file an application on or before May 4, 1988. In addition, before reaching a final decision on such applications, the INS may, in its discretion, require the applicant to produce corroborative evidence of the post-May 1, 1987 absence, including one of the following: (a) a sworn declaration from a third party with personal knowledge of the applicant's absence, or (b) a bus ticket or other form of transportation receipt evidencing the absence, or (c) any other evidence from which, when combined with the applicant's declaration, a reasonable inference can be drawn that the applicant in fact was absent from the country. If the defendant decides to follow this alternative on a permanent basis, he shall file a declaration so stating within 15 days of the effective date of this order.

If the applicant is prima facie eligible for legalization, the INS shall provide such applicant with a stay of deportation and temporary employment authorization pending final adjudication of the application.

This section shall apply to all Subclass 1 members in the United States, including those who failed to file an application within 30 days of receipt of an Order to Show Cause, and including those who applied for and were denied advance parole under 8 C.F.R. § 245a.1(g).

5. All applications filed pursuant to this order shall be finally adjudicated in accordance with the procedures and guidelines established pursuant to paragraph 4 of this order and in accordance with INA § 245A.

6. The confidentiality requirements of the legalization provisions of IRCA shall apply to all documents and evidence submitted by class members to establish

their entitlement to relief under this Order. Such documents shall not be made public or used for any purpose unrelated to this litigation by plaintiffs' counsel.

7. Appeals from denials of legalization applications filed pursuant to this order, including denials based upon a determination by INS that an applicant failed to demonstrate reliance on the unlawful regulation as the basis for failure to file a legalization application by May 4, 1988, shall be taken in accordance with the provisions of IRCA and the regulations promulgated thereunder for administrative and judicial review of denials of legalization applications.

8. Within 15 days of the effective date of this order, the government shall file and serve a proposed plan for publicizing the provisions of this order and the requirements for applications filed pursuant to this order, including, *inter alia*, making the names and addresses of plaintiffs' counsel available to subclass member applicants. Plaintiffs shall have 10 days thereafter to respond to the proposed plan.

9. The terms of this order appiy only to members of Subclass 1, as certified in this court's order of May 3, 1988.

10. The term "prima facie eligible for legalization" as used throughout this order is defined in 8 C.F.R. § 245a.1(n) and shall be implemented in a manner consistent with this court's order of May 3, 1988, regarding "brief, casual and innocent" absences.

11. Defendant shall advise all INS offices of the contents of this order and the court's May 3, 1988 order and class certification determination order.

12. This court shall retain jurisdiction to assure that this order is carried out fully and completely

and to provide such other and further relief as may be necessary to implement this order. If, in implementing this order, it appears necessary to either defendant or plaintiffs to modify the order, the parties shall first confer and attempt to reach agreement on such modification, and shall thereafter file a joint statement with the court setting forth the nature of the modification sought and the parties' respective positions on the proposed modification.

IT IS SO ORDERED.

DATED: June 10, 1988.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIV. S-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC.
(CENTRO DE GUADALUPE IMMIGRATION CENTER),
ET AL., PLAINTIFFS

v.

EDWIN MEESE, III, ETC., DEFENDANT

ORDER

[Filed Aug. 11, 1988]

Upon consideration of plaintiffs' request for supplemental relief, and the supporting and opposing documents and arguments submitted by the parties,

IT IS HEREBY ORDERED that this court's order of June 10, 1988 is supplemented as follows:

1. Defendant shall determine whether apprehended and detained persons (other than persons apprehended while entering or attempting to enter the United States who sign voluntary departure agreements), and persons in deportation proceedings, are subclass 1 members, and the INS shall not remove under voluntary departure or deportation orders, or otherwise, any subclass 1 members until they have had a reasonable opportunity, of not less than thirty (30) days, to submit an application as provided in

paragraph 3 of the order of June 10, 1988. In addition to any other method of inquiry, such aliens shall be questioned regarding their membership in subclass 1, using the form attached hereto as Appendix A.

2. All such apprehended and detained persons, and persons in deportation proceedings, who, upon inquiry as specified in the foregoing paragraph, reveal facts which indicate that they are, or may be, subclass 1 members, or whose INS files indicate that they are members of subclass 1, shall be provided a written notice of this court's orders regarding subclass 1, and the names, addresses and phone numbers of plaintiffs' counsel (attached hereto as Appendix B).

3. If defendant believes that forms different than those attached hereto as Appendices A and B should be used, counsel are to confer and prepare an agreed-upon set of forms within ten (10) days from the effective date of this order, and then submit it to the court for approval.

4. If detained aliens, after being provided such notice, indicate that they nevertheless wish to depart the United States, they shall acknowledge, in paragraph 6 of Appendix B, receipt of the Notices (Appendices A and B), and indicate their desire to nevertheless depart the country. The address to which they intend to return abroad shall be noted on the document in which they acknowledge receipt of the aforementioned notice, and copies of such acknowledgements shall be provided to plaintiffs' counsel upon request.

5. When giving any of the notices referred to in this order, the alien shall be asked if he can read the language in which the notice is written, and if such person indicates the inability to so read, the

notice shall be read verbatim in the language that the person speaks.

6. If defendant's agents believe that an alien who claims to be a subclass 1 member is not a member of the class and is therefore subject to expulsion pursuant to voluntary departure, a deportation order, or otherwise, it shall advise the alien of this decision in writing, explaining the reasons therefor, and promptly provide plaintiffs' counsel with a copy of such decision and copies of the applicant's application, declaration and evidence regarding membership in subclass 1. The alien shall be advised that plaintiffs' counsel has been provided copies of such documents and shall not be removed from the country for a period of twenty (20) days from the date such decision is served on the alien and mailed to plaintiffs' counsel, whichever date is later, during which period plaintiffs' counsel, or their designee, will be allowed to confer with and advise the alien, by telephone or in person, regarding the relief granted to subclass 1 members by this court. If, after said 20-day period, the alien wishes to assert rights as a subclass 1 member, the alien shall submit a statement accompanied by any relevant evidence to the INS. If the INS thereafter refuses to alter its initial determination, the INS' determination shall be treated as a denial of an application for legalization and shall be appealed in accordance with 8 U.S.C. § 1255a(f)(4).

IT IS SO ORDERED.

DATED: August 10, 1988.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

APPENDIX A

READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR RIGHT TO LIVE IN THE UNITED STATES

As a result of a court decision in a case called *Catholic Social Services v. Meese*, you may be allowed to remain in the United States and apply for legalization.

You might have rights under this case if you qualify for legalization *and* if you left for a brief trip, returning any time after May 1, 1987, without INS permission. Your trip must have been for an *innocent* reason(*e.g.*, visting relatives, a business trip, etc.).

In general, to be eligible for legalization, you must have continuously lived in the United States *illegally* since January 1, 1982, other than brief trips outside the United States. You may qualify under this court ruling even if your residence ended in the United States because (1) you were expelled by the INS after May 1, 1987, or (2) you left the country voluntarily, believing that you were not eligible for legalization.

If you did not file a legalization application by May 4, 1988, believing that you did not qualify because of a trip outside the United States after May 1, 1987, you may still file a legalization application, and be permitted to remain in the United States with a temporary work permit. The INS will give you a legalization application to fill out if you request one.

If you are now in the United States, you must also write a declaration stating (1) that you briefly left the United States and returned without INS permission on or after May 1, 1987, (2) how you heard

about the INS' policy which made you ineligible because of your trip outside the United States after May 1, 1987, and (3) because you thought you were ineligible, you did not file an application on or before May 4, 1988.

If you filed a legalization application by May 4, 1988, which was denied because you had made a brief trip outside the United States without INS permission after May 1, 1988, or because you did not file the application within thirty (30) days of the INS starting a deportation hearing against you, the INS will reconsider your application and apply the correct rule.

The INS may try to expel you from the United States even if you have rights under this case. *You may contact one of the following attorneys for assistance if you believe that you may have rights rights discussed in this notice*:

1. Peter Schey, Carlos Holguin or Helen Skiar: (213) 388-8693;
2. Ralph Abascal or Steven Rosenbaum: (415) 864-3405.

If you want to leave the United States even though you think you might benefit from this case, please fill out the information below to show that you received this notice, understand it, and still want to leave the country.

DATE _____

NAME _____ Signature _____

ADDRESS _____

_____

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

CIV S-86-1343-LKK

CATHOLIC SOCIAL SERVICES, INC. (CENTRO DE GUADALUPE IMMIGRATION CENTER), ET AL.,
PLAINTIFFS

vs.

EDWIN MEESE, III, Attorney General of the United States, DEFENDANT

ORDER GRANTING PARTIAL STAY

[Filed June 24, 1988]

PROPOSED STAY ORDER

In an Order dated April 22, 1988, following extensive briefing and argument by all parties, this Court enjoined defendants from continuing to implement 8 C.F.R. section 245a.1(g). In Orders dated May 3, 1988, the court modified the definition of subclass 1 and granted plaintiffs' motion for summary judgment setting forth detailed findings explaining why 8 C.F.R. section 245a.1(g) is inconsistent with [the] relevant statutory provisions of the Immigration Reform and Control Act of 1986. The court thereafter ordered and received further briefing and argument on the question of "what remedies are available to members of subclass 1 and whether a stay of this court's orders should be granted." On June 10, 1988, the court issued an Order granting relief to subclass 1 members generally requiring the readjudication of legalization applications filed by subclass 1 members in a manner consistent with the court's May 3, 1988, summary judgment order, and permitting certain subclass 1 members to file legalization applications on or before November 30, 1988. The court denied a stay of its order, *inter alia*, because "[m]embers of the subclass continue to be deported and rendered subject to voluntary departure."

On June 17, 1988, plaintiffs filed a motion to modify this Court's June 10, 1988 Order, arguing that it fails to prevent the expulsion of apprehended subclass 1 members. On June 21, 1988, on the basis of the Supreme Court's decision in *INS v. Pangilinan*, OT 1987, No. 86-1992 (June 17, 1988), defendants filed a motion to vacate that portion of the Court's June 10, 1988 Order "which relates to extending the amnesty filing deadline . . . until November 30, 1987 [sic]." Defendants also sought a stay of the same portion of the Court's May 10, 1988 Order pending disposition of their motion to vacate.

On June 23, 1988, the Court held a telephonic hearing and Ordered the plaintiffs, within ten (10) days, to file any opposition they may have to defendants' motion to vacate, and defendants, within ten (10) days, to file any opposition they may have to plaintiffs' motion to modify the Court's June 10, 1988 Order.

In this Order I resolve defendants' request for a stay pending disposition of their motion to vacate a

portion of the Court's May 10, 1988 Order. For the reasons explained below, a partial stay will be issued pending disposition of defendants' motion to vacate or further Order of the Court.

Without deciding the matter, it appears to the Court that it retains the equitable power to remedy the injury caused to subclass 1 members by defendants' unlawful promulgation and implementation of 8 C.F.R. section 245a.1(g). First, *Pangilinan* appears distinguishable on several grounds: (1) the Supreme Court nowhere concludes that the statute in question in *Pangilinan* was violated by the Attorney General; here, the Court has determined that the relevant IRCA statute was clearly violated by the Attorney General; (2) in *Pangilinan* the plaintiffs had several months to apply for naturalization, more than nationals of many other countries had; here, after this Court's April 22, 1988 Order, members of subclass 1 only had a few days to apply for legalization; (3) in *Pangilinan* the Court strengthened plaintiffs' argument in this case regarding application of the equitable tolling doctrine by reference to the application deadline as a "limitations period."

Second, as stated in *Pangilinan*, this Court retains the power to issue relief in the nature of "mandamus or [an] injunction" even assuming, *arguendo*, that it does not possess the equitable power to require INS to accept and adjudicate "legalization" applications until November 30, 1988. The Court's equitable power to remedy the injury suffered by subclass 1 members may be invoked to enjoin the expulsion of class members, and permit their employment. While not granting them the right to apply for "legalization" and all of the statutory benefits attendant that status, subclass 1 members would at least receive a part of

the benefit they were denied because of defendants' unlawful regulation and practice thereunder.

The Court is informed that the parties have attempted to reach agreement on the parameters of a stay order. Defendants have agreed to stay the expulsion of any apprehended person who affirmatively indicates membership in subclass 1 for the next ten (10) days. Plaintiffs however seek a stay Order which would protect from expulsion apprehended subclass 1 members not aware of their rights as class members (i.e. requiring an inquiry by the INS prior to expulsion). For all of the reasons heretofore expressed, and to preserve the *status quo* preventing the improper expulsion of subclass 1 members pending disposition of defendants' motion to vacate, IT IS HEREBY ORDERED that:

1. Paragraphs 3, 4 and 8 of this Court's June 10, 1988 Order are hereby stayed.

2. Pending disposition of defendants' motion to vacate, and plaintiffs' motion to modify this Court's June 10, 1988 Order, defendants, their agents, employees, and successors in office shall not remove under orders of deportation, voluntary departure, or otherwise, subclass 1 members, *except* defendants may remove subclass 1 members who (1) acknowledge, in writing, that they have been advised of the temporary stay of expulsion granted by this Order and still wish to depart the country; or (2) are otherwise subject to expulsion on grounds unrelated to this litigation. In the latter category defendants shall maintain records regarding the alternative basis for expulsion.

3. Defendants shall inquire of aliens apprehended and detained regarding their membership in subclass 1. Defendants need make no inquiry of aliens apprehended by the INS entering or attempting to enter

the United States without inspection or unlawfully through a port-of-entry.

4. In its discretion, the defendants may require subclass 1 members to submit evidence regarding their membership in the class and *prima facie* eligibility for legalization, as set forth in paragraphs 4 and 10 of this Court's May 10, 1988 Order. Subclass 1 members shall be provided a reasonable time of at least twenty (20) days to obtain such evidence as may be required by defendants prior to expulsion from the country.

5. The confidentiality requirements set forth in paragraph 6 of this Court's June 10, 1988, [*sic*] shall apply to any information obtained by defendants from subclass 1 members pursuant to this Order.

6. Defendants shall provide all apprehended or detained aliens identified as subclass 1 members with the names and phone numbers of plaintiffs' counsel Peter Schey and Ralph Abascal, and advise such class members that they may contact plaintiffs' counsel for additional information regarding their rights as class members. IT IS SO ORDERED.

DATED: June 24, 1988

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

Presented by:

/s/ Peter A. Schey
PETER A. SCHEY
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, Jacqueline Ligua, declare as follows:

1. I am employed in Los Angeles, California. My business address is National Center for Immigrants' Rights, Inc., 256 S. Occidental Blvd., Los Angeles, CA 90057.

2. I am over 18 years of age and am not a party to this action.

3. On this day I deposited in the United States Mail in an envelope bearing the requisite postage, express mail, addressed to:

Robert Kendall, Jr.
Office of Immigration Litigation
Civil Division
Department of Justice
601 D Street, Room 8212
Washington, D.C. 20530

and by first class mail to:

Glyndell Earl Williams
Special Assistant U.S. Attorney
3305 Federal Building
650 Capitol Mall
Sacramento, CA 95814

true and correct copies of the following document(s):

1. Proposed Order Granting Partial Stay

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23d day of June, 1988, in the city and county of Los Angeles, California.

/s/ Jacqueline Ligua

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIV. S-86-1343 LKK

CATHOLIC SOCIAL SERVICES, INC.
(CENTRO DE GUADALUPE IMMIGRATION CENTER),
ET AL., PLAINTIFFS

v.

EDWIN MEESE, III, ETC., DEFENDANT

ORDER

[Filed Aug. 11, 1988]

On June 22, 1988, defendant in the above-captioned case filed a motion to vacate those portions of this court's order filed June 10, 1988, that relate to the requirement that the INS accept and process applications from subclass 1 members through November 30, 1988. On the same day, plaintiffs filed a motion for reconsideration or, in the alternative, for supplemental relief. On June 24, 1988, this court ordered a partial stay of the June 10, 1988 order, pending disposition of the instant motions.

On August 8, 1988, defendant filed a notice withdrawing his motion and a motion to continue the stay effected by this court's order of June 24, 1988, either pending appeal or pending disposition of a motion for

a stay in the Ninth Circuit. The court's June 24, 1988 order is now VACATED. For the reasons set forth below, defendant's motion for a stay is DENIED, and plaintiffs' motion for supplemental relief is GRANTED.

This court's order of June 10, 1988 was in the nature of an injunction. Fed. R. Civ. P. 62(c) provides this court with discretion to "suspend, modify, restore or grant an injunction during the pendency of an appeal." Thus, plaintiffs' motion for reconsideration or for supplemental relief, which also seeks injunctive relief, is not barred by the pendency of the appeals of that order. Similarly, this court is not precluded from modifying its June 10, 1988 order or lifting the stay imposed on June 24, 1988, by reason of the appeals.

Defendant's motion to vacate was predicated on his contention that the order, insofar as it requires the INS to accept applications for processing until November 30, 1988 (past the May 4, 1988 deadline) is precluded by the Supreme Court's decision in *INS v. Pangilinan*, 56 U.S.L.W. 4645 (June 17, 1988). Accordingly, the court has reviewed the propriety of its injunction in light of *Pangilinan*.[1]

It is simply inconceivable to this court that *Pangilinan* has overturned hundreds of years of Anglo-American jurisprudence in the cavalier manner suggested by the Government's reading of the case.[2] Ac-

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[1] Despite the defendant's withdrawal of its motion, reconsideration of the injunction in light of *Pangilinan* is warranted and authorized. *See* Fed. R. Civ. P. 62(c).

[2] The court believes that plaintiffs' exhibit 0000 contains a reasonably accurate survey of the relationship of law and equity and will not hesitate here to fully explore that relationship. I only pause long enough to note that equity jurisprudence was created to relieve litigants of the strictures of

cordingly, this court reads the holdings of *Pangilinan* narrowly and as limited by the particular factual and statutory context in which that case arose. I recognize that there is dicta in the case which might suggest that the court is powerless to remedy the harm caused by defendant's violation of the statute. However, an extension of that dicta to the facts of this case would necessarily require a finding that the Court in *Pangilinan* had reversed 200 years of Anglo-American jurisprudence governing the equitable powers of courts to redress injuries for which there is no adequate remedy at law. Such an extension would also raise very serious questions about the scope of the executive's power and the checks on that power when it is exercised in a way that exceeds the boundaries of the law. This court simply cannot believe that the Supreme Court could have intended such sweeping changes in its opinion in *Pangilinan*. Moreover, adopting the Government's argument that only the Congress can rectify the illegal conduct of the executive branch would raise serious separation of powers questions. Indubitably, it has been a traditional, indeed one might say core function, of the judiciary to provide remedies for conduct of the executive branch violating statutes. Common sense suggests that just as a court is to read a statute to avoid constitutional questions, the court ought to read binding precedent, to the degree it can fairly do so, to avoid constitutional issues.

If I am incorrect in my view of *Pangilinan*, however, it is the alternative order of this court that defendant will be barred from excluding deporting, or subjecting to voluntary departure any subclass 1

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law; thus to suggest that equity must conform its decisions to the strictures of the statute applied strictissimi juris would negate the entire purpose of equity.

members who are otherwise eligible for legalization and must grant such aliens work authorizations. Such order will be effective immediately upon the reversal of this court's June 10, 1988 order by any court of competent jurisdiction.

Furthermore, for the reasons set forth in plaintiffs' motion for reconsideration, I find that it is appropriate to require the INS to provide notice to apprehend aliens of their rights under this court's order.

Accordingly, IT IS HEREBY ORDERED that:

1. This court's order of June 24, 1988 is VACATED. All portions of this court's June 10, 1988 order are of full force and effect.

2. Plaintiffs' motion for reconsideration or in the alternative for supplemental relief is GRANTED. This court's order of June 10, 1988 is supplemented by the Supplemental Order I have filed together with this opinion.

3. Paragraph 6 of this court's order of June 10, 1988 is amended to include defendant's counsel in the prohibition on disclosure contained therein.

4. This court's June 10, 1988 order is hereby amended to add the following paragraphs:

3. (a) If the provisions of paragraph 3 requiring defendant to accept applications from members of the class is reversed by any court, defendant is enjoined from removing under orders of deportation, voluntary departure, or otherwise, members of subclass 1, and shall grant work authorization to such persons, except such persons may be so removed who are otherwise subject to expulsion on grounds unrelated to this litigation. Paragraph 3(b)-(g) of this order shall become effective at the same time as this paragraph.

(b) Defendant shall determine whether apprehended and detained persons (other than persons apprehended while attempting to enter the United States who sign voluntary departure agreements), and persons in deportation proceedings, are subclass 1 members, and shall not remove under voluntary departure or deportation orders, or otherwise, any subclass 1 members until they have had a reasonable opportunity, of not less than sixty (60) days, during which time work authorization shall be granted, to demonstrate to defendant that, if they had had the opportunity to apply for benefits pursuant to paragraph 4 of this order, they would have been granted legalization. If they make such a showing, deportation shall be indefinitely stayed and work authorizations granted for the same period of time.

(c) In addition to any other methods of inquiry, apprehended and detained persons, and persons in deportation proceedings, shall be questioned regarding their membership in subclass 1, using the form attached hereto as Appendix "C."

(d) All such apprehended and detained persons, and persons in deportation proceedings, who, upon inquiry as specified in the foregoing paragraph, reveal facts which indicate that they are, or may be, subclass 1 members, or whose INS files indicate that they are members of subclass 1, shall be provided a written notice of this court's orders regarding subclass 1, and the names, addresses and phone numbers of plaintiffs' counsel (attached hereto as Appendix "D"). If such persons, after being provided such notice, indicate that they nevertheless wish to depart the United States, they shall be asked to acknowledge, in writing, receipt of the notice and indicating their desire to depart the country. The address to which they intend to return abroad shall be noted on the

document in which they acknowledge receipt of the aforementioned notice, and copies of such acknowledgements shall be provided to plaintiffs' counsel upon demand.

(e) When giving any of the notices referred to in the appendices of this order, or any other written matter that defendant uses to inform apprehended aliens, the person shall be asked if he or she can read the language in which the notice is written, and if such person indicates the inability to so read, the notice shall be orally read verbatim to such person in the language that the person speaks. The specific notices referred to in the appendices of this order shall be translated into at least the Spanish language and used to give notice to all persons who appear to speak Spanish.

(f) If defendants does not agree with the language or format of the notices contained in the appendices of this order, he shall promptly confer with counsel for plaintiffs and seek to resolve any disagreement informally within ten (10) days of this order, failing which the parties shall present the court with a summary of their disagreements within fifteen (15) days of the date of this order.

(g) If defendant's agents believe that a person who claims to be a subclass 1 member is not a member of the class and is therefore subject to expulsion pursuant to voluntary departure, a deportation order, or otherwise, the person shall be advised of this decision in writing, with an explanation of the reasons therefor, and defendant shall promptly provide plaintiff's counsel with a copy of such decision and copies of all documents relating to the claim of membership in subclass 1. The person shall be advised that plaintiffs' counsel has been provided copies of such docu-

ments and shall not be removed from the country for a period of twenty (20) days from the date such decision is served on the person, and mailed to plaintiffs' counsel, whichever date is later, during which period plaintiffs' counsel or their designee will be allowed to confer with and advise the person, by telephone or in person, regarding the relief granted to subclass 1 members by this court. If, after such 20-day period, the person wishes to assert rights as a subclass 1 member, the dispute shall be submitted to a magistrate of this court for resolution and removal shall be stayed pending such resolution. Such matter will be considered expeditiously so as not to delay any proper removals from the country.

5. Defendant's motion for a stay pending appeal or pending disposition of a motion for a stay by the Ninth Circuit is DENIED.

IT IS SO ORDERED.

DATED: August 9, 1988.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

APPENDIX "C"

READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR RIGHT TO LIVE IN THE UNITED STATES

As a result of a court decision in a case called *Catholic Social Services v. Meese*, you may be allowed indefinitely to remain in the United States and obtain work authorization.

You might have rights under this case if you would have qualified for legalization, even though you did not apply during the application period of May 5, 1987 to May 4, 1988, *and* if you had left for a brief trip, returning anytime after May 1, 1987, without INS permission. Your trip must have been for an *innocent* reason (e.g., visiting relatives, a business trip, etc.).

In general, to be allowed to stay in the United States and receive work authorization, you must have continuously lived in the United States *illegally* since January 1, 1982, other than brief trips outside the United States. You may qualify under this court ruling even if your residence ended in the United States because (1) you were expelled by the INS after May 1, 1987, or (2) you left the country voluntarily believing that you were not eligible for legalization.

You must also sign a declaration under penalty of perjury stating (1) that you briefly left the United States and returned without INS permission on or after May 1, 1987, (2) how you heard about the INS' policy which made you ineligible because of your trip outside the United States after May 1, 1987, and (3) because you thought you were ineligible, you did not file a legalization application on or before May 4, 1988.

If you filed a legalization application by May 4, 1988, which was denied because you had made a brief trip outside the United States without INS permission after May 1, 1987, or because you did not file the application within thirty (30) days of the INS starting a deportation hearing against you, the INS will reconsider your application and apply the correct rule.

The INS may try to expel you from the United States even if you have rights under this case. *You may contact one of the following attorneys for assistance if you believe that you may have rights discussed in this notice*:

1. Peter Schey, Carlos Holguin or Helen Sklar (213) 388-8693;
2. Ralph Santiago Abascal or Steve Rosenbaum (415) 864-3405.

APPENDIX D

FORM ON QUESTIONING APPREHENDED AND DETAINED ALIENS, AND ALIENS IN DEPORTATION HEARINGS, REGARDING *CSS V. MEESE* CLASS MEMBERSHIP

Name of alien ———————————

INS A #———————

1. Do you believe that you qualify for legalization: Yes— No—
2. Did you reside continuously in the United States unlawfully from January 1, 1982: Yes— No—
3. Did you briefly depart the United States for an innocent reason and return without INS permission after May 1, 1987: Yes— No—
4. Did you file an application for legalization by May 4, 1988: Yes— No—
5. Did you fail to file a legalization application by May 4, 1988 because you thought that you were ineligible because you returned to the U.S. after a brief absence sometime after May 1, 1988 without INS permission: Yes— No—

Date ————

Name of Questioning Officer (print): ————————

Alien granted stay of deportation? Yes— No—

If alien believes he or she is eligible for legalization, and appears to be a subclass 1 member in *CSS v. Meese*, and if stay of expulsion not granted, explain why (use a second sheet if necessary):

———————————————————

———————————————————

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 87-4757-WDK (JRx)

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL., PLAINTIFFS

vs.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., DEFENDANTS

OPINION AND ORDER RE RELIEF

[Filed Aug. 12, 1988]

On July 15, 1988, this Court issued an Order granting in part plaintiffs' motion for summary judgment and granting in part summary judgment in favor of defendants. At that time, the Court ordered further briefing from the parties related to the relief available to the prevailing plaintiffs. That briefing has been submitted and the parties have had an opportunity to respond to the positions taken by their respective counterparts. Having considered the materials submitted and heard oral argument on August 11, 1988, the Court hereby ORDERS that plaintiffs' request for injunctive relief is GRANTED.

BACKGROUND

When Congress enacted the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 8 U.S.C.A. § 1255a (West Supp. 1988) (IRCA), it provided that all illegal aliens who fall within the various requirements set forth in IRCA must apply for legalization during a 12-month period to be designated by the Attorney General. 8 U.S.C.A. § 1255a(a)(1)(A). The time period-designated by the Attorney General began on May 5, 1987 and ended on May 4, 1988. *See* 8 C.F.R. § 245a.2(a)(1) (1988). Both the statutory language and the regulatory language are mandatory —the alien "must apply" within the designated legalization period.

Despite these time limitations, plaintiffs in subclass one argue that declaratory relief is insufficient to remedy their injury caused by the Immigration and Naturalization Service's (INS) original policy. They contend that since the original policy was in effect between May 1, 1987 and November 17, 1987, they were deprived of roughly half of the twelve-month time period alloted to them in addition to being dissuaded from applying for legalization due to an erroneous, though substantially publicized, regulation.[1] As a consequence, plaintiffs ask this Court to grant them an extension of time to apply for legalization commensurate with the time lost. In order to minimize the tremendous impact of such an extension, plaintiffs ask that a new deadline of November 30, 1988, corresponding with the deadline accorded by Congress to agricultural workers, be created.

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[1] In their response to one request for admission, defendants indicated that, pursuant to the original policy, "it would not have been inconsistent with INS policy for INS employees . . . to advise potential applicants for legalization . . . that they were ineligible for legalization. . . ."

In support of their remedial request, plaintiffs effectively rely on three distinct, though in many ways related, principles. First, they invoke this Court's general equitable powers, arguing that it authorizes an extension of the filing deadline. Second, they contend that the INS' conduct equitably estops the agency from relying on the statutory time limit created by Congress. Finally, plaintiffs assert that the 12-month limitations period may be equitably tolled to permit further filings of legalization applications.

If plaintiffs prevail on any of these remedial theories, they further request that the INS be ordered to publicize the fact of additional time granted by the Court.

DISCUSSION

The statutory requirement that an alien apply for an adjustment of status during the 12-month period designated by the Attorney General is a jurisdictional requirement and not simply a statute of limitations. Section 1255a(a) sets forth a number of "requirements" for eligibility for legalization. An alien must establish a continuous unlawful residence in the United States since January 1, 1982, *see* 8 U.S.C.A. § 1255a(a)(2), a continuous physical presence in the United States since November 6, 1986, *see* 8 U.S.C.A. § 1255a(a)(3), and his admissibility as an immigrant. *See* 8 U.S.C.A. § 1255(a)(4). One additional requirement of the statutory scheme, indeed the first requirement, is that the alien "must apply for . . . adjustment during the 12-month period beginning on a date . . . designated by the Attorney General." 8 U.S.C.A. § 1255a(a)(1)(A).

When it denominated the timely application a "requirement" and listed it first among various other

requirements for eligibility, Congress expressly made § 1255a(a)(1)(A) a jurisdictional provision instead of a statute of limitations. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982). Because § 1255a(a)(1)(A) is a jurisdictional requirement, "[t]he government may not be equitably barred from asserting [it]." *Lee v. United States*, 809 F.2d 1406, 1410 (9th Cir. 1987) (quoting *McIntyre v. United States*, 789 F.2d 1408, 1410-11 (9th Cir. 1986)), *cert. denied sub nom. Lee v. Eklutna*, 108 S.Ct. 772 (1988). Thus, as a jurisdictional limitations period, § 1255(a)(1)(A) may not be equitably tolled and the government may not be equitably estopped from relying upon it.[2]

Plaintiffs' reliance on the doctrines of equitable estoppel and equitable tolling is further undermined by their failure to demonstrate affirmative misconduct by the INS. *See INS v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam).[3] Mere affirmative conduct will not support equitable estoppel against the government; the challenged action must constitute affirma-

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[2] Because the timely filing requirement of § 1255a(a)(1)(A) is jurisdictional, the cases cited by plaintiffs which involve merely statutes of limitation are inapposite.

[3] Most cases in which equitable estoppel is asserted against the government involve the questionable acts of an individual government official rather than the official acts of a government agency. Despite this factual distinction, plaintiffs must nevertheless establish that responsible officials at the INS engaged in affirmative misconduct when they caused to be promulgated an initial regulation which this Court has held to be "inconsistent with Congress' intent when it enacted IRCA." *League of United Latin American Citizens v. INS*, No. CV 87-4657-WDK (JRx), slip op. at 15 (C.D. Cal. July 15, 1988).

tive *mis*conduct, and such misconduct does not contemplate simple negligence. *Morgan v. Heckler*, 779 F.2d 544, 545 (9th Cir. 1985). Affirmative misconduct must also be demonstrated to invoke equitable tolling against the government. *See, e.g., Gibson v. United States*, 781 F.2d 1334, 1344-45 (9th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 928 (1987); *Hyatt v. Heckler*, 807 F.2d 376, —— (4th Cir. 1986), *cert. denied sub nom. Bowen v. Hyatt*, 108 S.Ct. 79 (1987).

Many cases apparently construe misconduct to involve some type of intentional or active "misrepresentation" or "concealment," *see, e.g., Wagner v. Director, Federal Emergency Management Agency*, 847 F.2d 515, 519 (9th Cir. 1988); *United States v. Harvey*, 661 F.2d 767, 775 (9th Cir. 1981), *cert. denied*, 459 U.S. 833 (1982); *United States v. Ruby Co.*, 588 F.2d 697, 704 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979), or a "deliberate lie" or "pattern of false promises." *Mukherjee v. INS*, 793 F.2d 1006, 1009 (9th Cir. 1986). No such malfeasance has been demonstrated or even alleged by plaintiffs and cannot be presumed simply because the INS promulgated regulations which have been held to be invalid. *See INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam); *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981) (per curiam); *United States v. Browning*, 630 F.2d 694, 703 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981). *See also* Note, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. Chi. L. Rev. 1026, 1044-47 (1986).

What remains to be considered is whether this Court, when fashioning the equitable relief requested by plaintiffs in subclass one, may, despite the foregoing restrictions, enjoin the INS from refusing to accept and process legalization applications of those aliens who legitimately fall within subclass one.[4]

Defendants invoke language in *United States v. Ginsberg*, 243 U.S. 472, 474 (1917), to the effect that "[a]n alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." The issue is not, however, as defendants then assert, "whether this Court has the power to ignore the express words of the statute. . . ." The express words of the statute are that an alien must apply for legalization "during the *12-month* period" designated by the Attorney General. 8 U.S.C.A. § 1255a(a)(1)(A) (emphasis added).[5] De-

[4] Plaintiffs' failure to satisfy what this Court has denominated as a jurisdictional requirement—the timely filing of a legalization application—does not divest this Court of subject matter jurisdiction. Obviously, this Court would lack subject matter jurisdiction to review the denial of an individual adjustment of status as authorized by § 1255a(f) where the alien had failed to timely file an application. *Cf. Lee v. INS*, 685 F.2d 343 (9th Cir. 1982) (per curiam); *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980). That, however, is not the question presented by this lawsuit. Instead, plaintiffs in subclass one complain that they have not been provided with an opportunity to apply for legalization and thus satisfy this jurisdictional requirement because the INS promulgated regulations inconsistent with congressional intent, and they seek appropriate relief for the harm caused by that error. This Court clearly has subject matter jurisdiction to consider this challenge.

[5] Defendants also argue that injunctive relief is improper because Congress voted on April 28, 1988 not to extend the

fendants effectively designated a six month period for applications by those who fall within subclass one. It is the INS, therefore, which failed to obey the express words of the statute.

In essence, plaintiffs in subclass one ask that the INS be compelled to do what Congress has instructed: to designate a full 12-months during which they may apply for legalization. Rather than ignoring the express words of Congress, plaintiffs in subclass one seek to abide by them by applying within that 12-month period because, according to the class definition, they were dissuaded from doing so by the original INS policy and the fact that they did not learn of the policy's modification until too late.[6] Consequently,

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12-month deadline in the face of various judicial challenges to INS regulations and other confusion. *See* 134 Cong. Rec. S5043 (daily ed. April 28, 1988). This congressional action does not have the dispositive significance which defendants seek to attribute to it. Congress did not vote or otherwise express a desire to preclude courts from rectifying regulatory inconsistencies with its policies as manifested in IRCA for those individuals who have been injured by those policies. All Congress did was to affirm its 12-month application period as it relates to all aliens, whether or not they have been injured by those policies.

[6] The factual question of the extent of the INS' publicity of its modified policy neither precludes summary judgment regarding plaintiffs' requested relief nor supports defendants' position that the requested relief is unwarranted. Subclass one is comprised of "all persons who qualify for legalization but who were deemed ineligible for legalization . . . who learned of their ineligibility on or after May 1, 1987 but did not learn about INS' modified policy . . . and, relying upon information that they were ineligible, did not apply for legalization on or before May 4, 1988." Thus, no matter how extensive the publicity, these plaintiffs, by definition, did not learn of the change. The extent of the publicity is therefore irrelevant.

the fundamental premise of defendants—*viz.*, that the applications of these plaintiffs are late and thus their consideration would dispense with one requirement for legalization—is simply incorrect. The applications are not "late" because the aliens in subclass one were not given the statutorily prescribed 12 months in which to apply for legalization.

Defendants rely heavily on *INS v. Pangilinan*, 108 S.Ct. 2210 (1988), for the proposition that permitting plaintiffs to apply for legalization would be in contravention of public policy as expressed by Congress and therefore impermissible. Defendants read *Pangilinan* much too broadly. The Supreme Court held that where an alien has "no statutory right to citizenship," even a court sitting in equity may not confer citizenship upon that alien for equitable reasons. *Id.* at 2215-16. The Court premised its decision on the plain fact that Article I, § 8 of the Constitution permits only Congress to grant citizenship and thus where an alien does not qualify under the terms set forth by Congress, a court may not nevertheless grant citizenship by ignoring those terms. *Id.* at 2215.

This case differs from *Pangilinan* in four very important respects. First, plaintiffs here rely upon a statutory violation to support their claim for equitable relief. Second, the failure of the INS properly to adhere to the provisions of IRCA indicates that the INS' position is not " 'enforcing the public policy established by Congress.' " *Id.* at 2215 (quoting *Hibi*, 414 U.S. at 8). Third, unlike the statute involved in *Pangilinan*, by which Congress itself established the cut-off date, IRCA merely creates a 12-month period to apply for an adjustment of status. The congressional policies differ because the former creates a final date after which Congress did not wish applica-

tions to be heard, whereas the latter focuses on a specific period of time to be allotted to legalization applications. Finally, the Supreme Court expressly distinguished the inability of a court to confer citizenship with a court's traditional equitable powers such as injunctive relief. *See id.* at 2216 ("More fundamentally, however, the power to make someone a citizen of the United States has not been conferred upon the federal courts, like madamus or injunction, as one of their generally applicable equitable powers.").[7]

Plaintiffs in subclass one do not propose that this Court grant them citizenship. *Pangilinan* suggests that even where an executive agency fails to comport with congressional policy, this form of relief is unavailable. What is available, however, and what these plaintiffs seek, is an order enjoining the INS from denying them the opportunity to apply for an adjustment of status on timeliness grounds when the untimeliness resulted from the INS' erroneous policy. This relief is meaningfully different from the relief sought in *Pangilinan* because all that is being granted here is the right to apply for an adjustment of status with the attendant possibility that the application may properly be denied.

The Court is not unaware of the fact that many illegal aliens who fall without subclass one and some of those who counsel them will view this ruling as an opportunity to gain entry into the United States by

[7] This equitable relief would be available irrespective of whether this case is a suit at law or in equity. *See* Fed. R. Civ. P. 2; *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1043, at 138 (1987).

falsely declaring reliance on the INS' original policy. This inevitability cannot, however, foreclose the benefits of the congressional legalization mandate set forth in § 1255a(a)(1)(A) for those who did legitimately rely on INS statements. The Court is confident that those charged with determining reliance on the initial INS policy in individual cases will consider very carefully the claims of those who seek to avail themselves of this decision.

Accordingly, IT IS HEREBY ORDERED that summary judgment regarding the relief available to plaintiffs in subclass one shall be entered in favor of plaintiffs in subclass one,

IT IS FURTHER ORDERED that the INS is enjoined from refusing to accept applications for an adjustment of status of those aliens who fall within subclass one, beginning immediately and ending November 30, 1988, or, if defendants seek and are granted a stay of this Order, and if this Court's Order is thereafter affirmed by the Ninth Circuit, for a period of 120 days after such affirmance, PROVIDED that the alien contemporaneously provide a sworn affidavit attesting that he or she falls within subclass one, and PROVIDED FURTHER that if an alien is represented by counsel, counsel shall provide a sworn affidavit that to the best of his or her knowledge after reasonable inquiry, the alien meets the requirements of subclass one,

IT IS FURTHER ORDERED that the INS shall, consistent with the evidentiary requirements and standards of proof set forth in IRCA, and within two weeks from the date of this Order, establish appropriate procedures to determine whether an applicant

claiming to fall within subclass one indeed legitimately does,

IT IS FURTHER ORDERED that the INS shall, in cooperation with qualified designated entities, take reasonable steps to disseminate this Court's ruling to aliens who may fall within subclass one. This dissemination shall include, but not necessarily be limited to, notifying qualified designated entities and issuing press releases to the INS press list immediately upon development of the procedures for determining eligibility,

IT IS FURTHER ORDERED that any illegal alien apprehended by INS enforcement officials who claims to fall within subclass one shall, in lieu of immediate deportation, be given adequate time to apply for legalization, and

IT IS FURTHER ORDERED that this Court shall continue to retain jurisdiction to assure that this Order is carried out fully and completely and to provide such other and further relief or modifications as may be necessary.

IT IS SO ORDERED.

DATED: August 12, 1988

/s/ William D. Keller
WILLIAM D. KELLER
United States District Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-15046,
88-15127,
88-15128

CATHOLIC SOCIAL SERVICES, INC., ET AL.,
PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

v.

WILLIAM P. BARR, Attorney General of the United States,[1]
DEFENDANT-APPELLEE/CROSS-APPELLANT

No. 88-6447

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC,), ET AL., PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND NATURALIZATION SERVICE,
DEFENDANT-APPELLANT

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[1] Attorney General Barr is substituted for former Attorney General Thornburgh pursuant to Fed. R. App. P. 43(c)(1).

MOTION FOR STAY AND RESPONSE TO PLAINTIFFS' MOTION FOR ISSUANCE OF MANDATE

The Attorney General of the United States and the Immigration and Naturalization Service (INS) respectfully move this Court for a stay in the above-captioned cases. This motion asks the Court (1) to stay its mandate, and (2) to order that the INS need not accept further legalization applications or process existing applications pending the Supreme Court's disposition of the cases.

The fundamental reason for this motion is that, even though Congress intended the filing period for legalization applications to last only one year, and even though the district courts ordered extensions of no more than six months, members of the plaintiff classes in these cases have now had nearly *FOUR EXTRA YEARS* to file amnesty applications. The operation of the stay orders previously entered in these cases has therefore given plaintiffs an extraordinarily ample and generous time within which to file applications. On the other hand, the extension of time has greatly burdened the government. It has caused a very significant problem of fraudulent applications, and it has imposed severe financial and administrative burdens on the INS, which continue to irreparably impair the ability of the Service to perform its normal functions. Accordingly, the balance of the equities at this stage of the case heavily favors granting a stay to the government.

I. STATEMENT

These cases concern the alien legalization program created by the Immigration Reform and Control Act of 1986 (IRCA or Act). The Act allowed certain

aliens unlawfully present in this country to have their status adjusted to that of an alien lawfully admitted for temporary residence, if they filed an application for such adjustment within a twelve-month period beginning on a date fixed by the Attorney General (which date had to be no later than 180 days after the enactment of the Act). 8 U.S.C. § 1255a(a)(1). The Attorney General fixed the period to be the twelve months ending on May 4, 1988. 8 C.F.R. § 245a.2(a)(1).

Each of these two cases in a class action concerning regulations that the INS issued to interpret the requirements that aliens had to satisfy to be eligible for legalization under IRCA. *See Catholic Social Services, Inc. v. Thornburgh*, Nos. 88-15046 et al., slip op. at 1510, 1513. In each case, it was held that the INS's regulation was not a permissible interpretation of the statute. *Id.* at 1511, 1514. The district courts, in each case, ordered as a remedy that the INS extend the period during which aliens could apply for legalization until November 30, 1988. *Id.* at 1512, 1514. In the *CSS* case, this represented a six-month extension; in the *LULAC* case, it represented a four-month extension.

The government appealed both cases to this Court. This Court ordered expedited briefing and argument in the *CSS* case. Argument was held on November 18, 1988. *Id.* at 1505. The Court later consolidated the two cases and received briefs from the parties in the *LULAC* case without holding further argument. *Id.* at 1515.

During the pendency of the appellate litigation, the district courts' orders were each subject to a stay. In each case, the terms of the stay provided that the INS was obliged to grant temporary work authorizations and stays of deportation to any class member

whose application made a prima facie showing of eligibility for legalization. *See* Attachment B1, ¶ 2; Attachment B5, ¶¶ 1-2; Attachment C, ¶ 3(b), (e). The INS was not, however, obliged to process legalization applications while appeal was pending.

On February 13, 1992, this Court issued its opinion in the two cases. The Court affirmed the judgments of the district courts. Noting that the time periods specified in the original injunctions had expired, the Court remanded the cases so that the district courts could revise the time periods to provide for equivalent extensions of the application period. *CSS*, slip op. at 1523, 1525.

In response to a government motion, the Court extended the government's time to seek rehearing of its order until March 26, 1992. After due consideration of the urgency of the cases, the Solicitor General has decided not to seek rehearing from this Court, but to proceed directly to seek a writ of certiorari from the Supreme Court, and to file this motion seeking a stay pending Supreme Court action.

II. JUSTIFICATION FOR A STAY

A stay pending certiorari is appropriate when there is a reasonable probability that certiorari will be granted, a significant possibility that the judgment will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if a stay is not entered. *See Barnes v. E-Systems, Inc.*, 112 S. Ct. 1, 2 (1991) (Scalia, Circuit Justice). Assuming these requisites are met, a court should enter a stay if the balance of the equities makes such a stay appropriate. *Id.* at 3.

As we shall now show, the stay orders that were in effect pending this Court's decision have significantly altered the balance of the parties' legitimate interests

in these cases. Three key factors have altered the balance of interests that originally supported the entry of the stay orders: first, as a result of the stay orders, genuine class members entitled to relief under the district courts' original orders have now had an extraordinarily generous period of time within which to file their applications. Second, because of widspread fraud now associated with the legalization program, the benefits of the stay orders are primarily being sought by aliens who are not members of the plaintiff classes. Finally, the stays have posed an extreme financial and administrative burden on the government, which has made INS far less able to perform its normal operations. Accordingly, the balance of equities in this case now favors the government.

Furthermore, the prerequisites for a stay are met. As we shall show, there is a reasonable probability that certiorari will be granted in these cases, and a significant possibility that the judgment will be reversed. If this Court's mandate issues and the district court proceeds to implement its original orders, the government will be exposed to the irreparable harm of six further months of disruption of the INS's operation. In light of these factors and the balance of interests involved, a stay in favor of the government pending Supreme Court action on the cases is now appropriate.

A. The Operation of the Existing Stay Orders Has Significantly Altered the Balance of the Parties' Legitimate Interests.

1. *Extraordinary Relief Provided to Class Members.*

The district courts' original injunctions in these cases ordered the government to extend the time period for class members to file applications for an extra four

months (in the *LULAC* case) or six months (in the *CSS* case). As a result of the stay orders that governed the cases while this appeal was pending, however, aliens have had, as of the date of this motion, an extra *three years, ten months, and twenty-two days* within which to file their applications.

The "interim" relief provided by the stays has, therefore, entirely overwhelmed the relief that the plaintiffs originally won in the district court. The effect of the stays has been to provide aliens with an additional period nearly four times as long as the application period originally granted to them by Congress, and eight or twelve times as long as the additional periods ordered by the district courts. Genuine class members who are truly entitled to relief under the district courts' orders have thus had an extraordinarily ample and generous time within which to present their applications.

2. *Fraudulent Applications.*

Furthermore, the benefits of the extension of the legalization program are at this time primarily being sought by aliens who are not members of the plaintiff classes. The INS has observed that nearly 90 percent of the applications currently being filed are from non-class-members or are fraudulent. *See* Declaration of James A. Puleo ("Puleo Decl.") ¶ 4a (Attachment A). This problem is hardly surprising, since most genuine class members probably filed their applications long ago.

This problem has been exacerbated by the generous evidentiary requirements of the stay orders. Under the terms of the stays, an alien does not have to produce the same kind of evidence that would be needed to qualify for legalization under IRCA. The alien need

only show "prima facie" eligibility for legalization. *See* Attachment B1, ¶ 4; Attachment C, ¶ 3(f). Thus, aliens have been able to show eligibility for relief under the stays pursuant to a far less demanding evidentiary standard than will ultimately apply to their applications for adjustment.

Indeed, the 90 percent figure given above is the percentage of applicants that are immediately recognizable as failing the prima facie test. The remaining 10 percent are merely those whose applications suffice under the prima facie evidentiary standard. The vast majority of these will probably turn out not to be eligible for adjustment when their applications are reviewed under a more rigorous standard. Puleo Decl. ¶ 4a.

The benefits available under the extension of the legalization program have created a market in which certain attorneys and middlemen arrange for the submission of fraudulent applications. Such "facilitators" are charging aliens between $1,000 and $6,000 for the preparation of fraudulent documents. Puleo Decl. ¶ 4a. In many cases, INS has observed that unrelated aliens are simply submitting a near duplicate of a single set of documents previously submitted by other aliens. *Id.* at ¶ 4a. Vendors are simply selling packaged documents to ineligible aliens who are willing to pay the price. *Id.* Obviously, these documents are fraudulent.

Not only does this mean that aliens who are not class members are applying for the benefits of the extended program, but fraud has also become a significant law enforcement problem. INS has been forced to launch a major investigative initiative to attempt to protect itself from frauds. INS has opened over 40 investigations involving 200 facilitators and thousands of applications. *Id.* at ¶ 4b. These investigations have re-

sulted in 145 arrests or indictments and 42 convictions. *Id.* INS's investigative section has been unable to keep up with the level of fraud that is now associated with the legalization program. *Id.*

3. *Burden on the Government.*

Finally, the extended applications period has imposed an extreme burden on the INS and is irreparably harming INS's ability to conduct its normal operations. During the almost four years that stays have been in effect, the INS has received approximately *three hundred thousand* applications for legalization. Puleo Decl. ¶ 3. Additional applications are still arriving at an average rate of about 1,200 per week. *Id.* The task of dealing with these applicants, the vast majority of whom do not appear to be eligible for legalization, is overwhelming INS's personnel and financial resources and is forcing INS to divert vital resources from other areas. *Id.* at ¶ 5.

The financial burden of dealing with the applications has been considerable. IRCA's legalization program was originally intended to be self-funding. The INS was able to maintain the considerable staff necessary to implement the program only because the fees required of applicants were sufficient to cover costs. *Id.* at ¶ 6a. The stay in the *CSS* case, however, prohibits the INS from requiring aliens to tender the normal application fee with their application. As a result, the INS has been deprived of about $44,000,000 for use in dealing with applications. *Id.* at ¶ 6b. The agency has therefore had insufficient funds with which to continue the legalization program. *Id.* at ¶ 6c.

Because of this shortfall, and because of the administrative demands of handling these applications, INS has been forced to reduce the resources it devotes to

other aspects of the legalization program. For example, of the 1.9 million aliens that applied for legalization during the original, congressionally-fixed applications period, INS still has over 55,000 who are now scheduled to have "Phase II" interviews (that is, interviews regarding their applications to have their status adjusted from that of temporary resident to permanent resident), and over 52,000 who have been approved for Phase II but have not yet filed for adjustment. *Id.* at ¶ 5b. District offices have been instructed to maintain processing of Phase II applications, but in order to have sufficient resources to deal with applications in the *CSS* and *LULAC* cases, district offices have been forced to reduce public inquiries, employment authorization extensions, the granting of permission of aliens to leave the United States temporarily, and all other services relating to the original legalization program. *Id.* The need to deal with *CSS* and *LULAC* applicants is therefore redounding to the detriment of those aliens who filed before the original, May 4, 1988 deadline.

The press of *CSS* and *LULAC* applicants has also forced INS to reduce certain of its services regarding aliens in general. For example, INS has been forced to divert personnel from adjudicative services such as naturalization. *Id.* The stay orders have thus rendered INS less able to provide its normal level of services to aliens.

INS originally planned its implementation of IRCA's legalization program with the intended one-year life of the program in mind. *Id.* at ¶ 5a. Many of the program's resources, such as leased offices, data processing services, and temporary personnel, have been or are being terminated. After April, 1992, only two full-time legalization offices will remain open (of

the 109 open at the start of the program). The legalization program has ceased to be a distinct part of INS. *Id.* As a result, the burden of dealing with the remaining applications and applicants will fall, as it has already begun to fall, on INS's district offices as part of their regular functions. *Id.* This burden will further reduce the ability of these offices to provide services to aliens and conduct their normal operations.

4. *The New Balance of Interests.*

The existing situation is intolerable. Requiring INS to continue accepting applications will most likely have the effect of inappropriately benefiting aliens who were never eligible under IRCA's legalization program, at the cost of diluting the resources that INS has available to provide services to aliens who are genuinely eligible for them. Given the nearly four-year extension of the application period that has already occurred, it seems very unlikely that there are any aliens remaining who have lived in the United States illegally since 1982 and who are eligible for relief under the district courts' orders, but who have not had a fair opportunity to apply for it. The balance of the equities in the case therefore favors the government.

B. The Prerequisites for a Stay are Met.

1. *There is a Reasonable Probability that the Supreme Court Will Grant Certiorari, and a Significant Possibility that the Judgment Will Be Reversed.*

As this Court's opinion itself noted, there is a conflict between this Court's opinion and the opinion of the D.C. Circuit in *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742 (D.C. Cir. 1991). *See CSS*, slip op. at

1519 (this Court declines to follow *Ayuda*). For this reason, and because of the importance of the case, there is certainly a reasonable probability that the Supreme Court will grant certiorari.

Furthermore, although we realize, of course, that this Court has ruled against the government, we respectfully submit that there is a significant possibility that the Supreme Court will reverse this Court's judgment. The Supreme Court's decision in *INS v. Pangilinan*, 486 U.S. 875 (1988), held that courts cannot extend statutory deadlines for aliens to file applications with the INS. While this Court found *Pangilinan* to be distinguishable from the present case, we respectfully submit that, at the very least, the question is of sufficient difficulty that there is a significant possibility that the Supreme Court will rule differently.

2. *Assuming the Correctness of the Government's Position, There is a Likelihood of Irreparable Harm if a Stay is not Granted.*

If the stay requested by the government is not granted, and the case is returned to the district courts for implementation of their orders, irreparable harm will be imposed on the government. The filing of applications will continue to overwhelm the INS's district offices and to significantly dilute their ability to implement their normal missions of providing servces to aliens, as was detailed above. INS will be obliged to devote still further resources for the publicity campaign required by the district court's order in *CSS*. If INS is required to *process* existing applications, its adjudicatory processes will be likewise overwhelmed, and the processing will lead to grants of residency that will later have to be rescinded if

the Supreme Court ultimately decides the case in the government's favor. Puleo Decl. ¶ 7.

Assuming the correctness of the government's position, all of these INS resources will have been expended purposelessly. If the Supreme Court ultimately reverses this Court's judgment, INS will have devoted its resources to the receipt and handling of thousands of applications that it should never have been required to receive. Because of the very significant impact that these appilcations are having on the Service's ability to perform its normal functions with its limited resources, this irreparable harm is substantial.

Furthermore, in light of experience under the existing stay orders, the likelihood is that the vast majority of applications filed will be fraudulent or otherwise from aliens who are not members of the plaintiff classes, and that the benefit of the new application period will go to such aliens. Fraudulent applications will also continue to pose a significant law enforcement problem.

C. *The Requested Stay.*

In light of the foregoing factors, an appropriate balancing of the interests of the parties and of the public would require that INS not be obliged to accept further legalization applications pending Supreme Court review of these cases. Accordingly, the government requests that this Court stay its mandate pending the Supreme Court's disposition of the case, and, furthermore, that the Court order that the INS not be required to accept further applications during that period. We attach a draft of the order the government requests.

We emphasize that the government is *not* simply asking that the Court stay its mandate. Such a stay

would continue pending Supreme Court action the same increasingly intolerable situation that has existed for the last four years. In order to grant the government appropriate interim relief pending Supreme Court review, this Court should not only stay its mandate, but should also modify the existing stays, by ordering that INS need not accept further applications.

III. RESPONSE TO PLAINTIFFS' MOTION FOR ISSUANCE OF MANDATE

On March 2, 1992, the plaintiffs moved for the issuance of this Court's mandate notwithstanding any petition for rehearing that the government might file. The plaintiffs alleged that issuance of the mandate was necessary "to protect class members from irreparable injury during the pendency of any petition for rehearing defendants may eventually file." Plaintiffs' Motion at 1.

Since the government has not filed a petition for rehearing, we respectfully suggest that the plaintiff's motion is moot. If the Court grants the government's motion for a stay, then, of course, its mandate will not issue; if the Court denies the government's motion, then its mandate will issue (in the absence of Supreme Court intervention). In either case, there is no need to rule on the plaintiffs' motion, which was designed primarily to guard against a lengthy, automatic stay of this Court's mandate pending the consideration of a petition for rehearing.

Furthermore, we note that the plaintiffs' motion for the issuance of the mandate consists largely of repetition of allegations against the INS that have previously been brought to this Court's attention and refuted in connection with the plaintiffs' August 20,

1990 motion for modification of the stay orders, which this Court denied. Plaintiffs allege that class members arrested by the INS are not being questioned regarding their membership in the class. This allegation was made in the plaintiffs' August 20, 1990 motion in this Court. *See* Motion to Modify Stay Orders and Opposition to Defendants-Appellants' Motion to Vacate Stay Orders at 12. As the government noted in its response (filed September 10, 1990), INS has instructed its field officers on several occasions to comply with this aspect of the *CSS* stay order. *See* Reply to Opposition to Government's Motion to Modify Stays and Opposition to Plaintiffs' Cross-Motion to Modify Stays at 19; *see also* Puleo Decl. ¶ 8.

Plaintiffs also allege that class members are routinely denied stays of deportation and temporary employment authorization "without explanation and despite their clear membership in the class." Again, the government's September 10, 1990 filing described in detail the INS's efforts to ensure that the standards and procedures required by the stays are observed by the personnel in the INS's officers throughout the country. *See* Reply to Opposition to Government's Motion to Modify Stays and Opposition to Plaintiffs' Cross-Motion to Modify Stays at 14-19; *see also* Puleo Decl. ¶ 9. The plaintiffs' allegation amounts to no more than a difference of opinion as to whether aliens in particular cases have demonstrated membership in the plaintiff class.

Finally, plaintiffs allege that aliens who travel outside the United States after being found to be class members are not being readmitted. This is in some cases true, but it does not show anything wrong with INS's operations. INS is simply treating the aliens who have applied under the *CSS* and *LULAC* stays

like any other aliens who have applied for legalization under IRCA but who have not yet been granted temporary residence status. Such aliens require advance permission before they may leave the country and return. *See* 8 C.F.R. § 245a.2(m)(1). Therefore, INS is lawfully refusing to readmit aliens who have not obtained such advance permission.

Accordingly, this Court should deny the plaintiffs' motion or dismiss it as moot.

IV. POTENTIAL NEED TO CLARIFY THE COURT'S OPINION

Finally, we would like to call the Court's attention to a statement in its opinion that, we respectfully suggest, may require a slight clarification. At the end of its opinion, the Court, having held that the district courts had power to extend the statutory deadline for filing an application, stated, "[b]ecause the initial time period provided in the injunctions has expired, the actions are remanded to the district courts to revise the injunctions to provide an equivalent extension of the application period." Slip op. at 1523. The Court's final order was that the judgments were "affirmed and remanded for adjustment of time periods specified in the injunctions." Slip op. at 1525.

We respectfully suggest that there is no need for the district courts' orders to be adjusted. The district court's order in each case already provides for the possibility that the order would be stayed, an appeal taken, and the judgment later affirmed. The order in *CSS* required the government to accept applications until November 30, 1988, or, if the order was stayed and thereafter affirmed by this Court (as it was), for a period of 180 days after affirmance. Attachment D at 4, ¶ 3. The order in *LULAC* similarly required the

government to accept applications until November 30, 1988, or, if the order was stayed and thereafter affirmed by this Court (as it was), for a period of 120 days after affirmance. Attachment E at 9.

Accordingly, we respectfully suggest that, regardless of whether the Court grants our motion for a stay of its mandate, it may wish to clarify its opinion to provide simply that the judgments at the district courts are affirmed. Such a clarification would have the salutary effect of providing certainty with regard to what the government's obligations now are under the orders that have been affirmed.

CONCLUSION

For the foregoing reasons, the government's motion for a stay should be granted. The government requests that the Court enter the attached order.

Respectfully submitted,

/s/ Michael Jay Singer
MICHAEL JAY SINGER
(FTS) 368-5432
(202) 514-5432

/s/ Jonathan R. Siegel
JONATHAN R. SIEGEL
(FTS) 368-4821
(202) 514-4821

Attorneys
Appellate Staff
Civil Division, Room 3127
Department of Justice
Washington, D.C. 20530-0001

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-15046,
88-15127,
88-15128

CATHOLIC SOCIAL SERVICES, INC., ET AL.,
PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

v.

WILLIAM P. BARR, Attorney General
of the United States,
DEFENDANT-APPELLEE/CROSS-APPELLANT

No. 88-6447

LEAGUE OF UNITED LATIN AMERICAN CITIZENS
(LULAC), ET AL.,
PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND NATURALIZATION SERVICE,
DEFENDANT-APPELLANT

ORDER

On consideration of the plaintiffs' motion for issuance of mandate, and the defendants' response thereto, and the defendants' motion for a stay, and the plaintiffs' response thereto, IT IS ORDERED:

1. The mandate of this Court in these cases is stayed pending the timely filing of a petition for a writ of certiorari. If the petition is granted, the mandate shall remain stayed pending the Supreme Court's disposition of the cases.

2. During the pendency of the Supreme Court's consideration of the cases, the government shall not be obliged to accept legalization applications. The government also shall not be obliged to process existing legalization applications filed in connection with these cases.

3. The government shall maintain all existing work authorizations and stays of deportation previously granted in connection with these cases, except as permitted by the stay orders previously entered in these cases.

4. This order shall expire when the Supreme Court issues its mandate in the above-captioned cases.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 1992, I served the foregoing motion by causing true copies to be mailed by overnight courier to:

Peter A. Schey, Esq.
Center for Human Rights and Constitutional Law
256 South Occidental Blvd.
Los Angeles, CA 90057

Stephen A. Rosenbaum
Ralph Santiago Abascal
California Rural Legal Assistance, Inc.
2111 Mission Street, Suite 401
San Francisco, CA 94110

Michael Rubin
Altshuler & Berzon
177 Post Street, Suite 600
San Francisco, CA 94108

and by first class mail, postage prepaid, to:

Stewart Kwoh
Asian Pacific American Legal Center
1010 S. Flower Street, Suite 302
Los Angeles, CA 90015

Marco Antonio Rodriguez
Centro De Asuntos Migratorios
815 3rd Ave., Suite 219
Chula Vista, CA 92010

William Tamayo
Asian Law Caucus, Inc.
468 Bush Street, 3rd Floor
San Francisco, CA 94108

Marc van der Haut
National Lawyers Guild
3689 18th Street
San Francisco, CA 94110

Antonio Rodriguez
609½ Echandia Street
Los Angeles, CA 90033

/s/ Jonathan R. Siegel
JONATHAN R. SIEGEL

ATTACHMENT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-15046,
88-15127,
88-15128

CATHOLIC SOCIAL SERVICES, INC., ET AL.,
PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

v.

WILLIAM P. BARR, Attorney General
of the United States,[1]
DEFENDANT-APPELLEE/CROSS-APPELLANT

No. 88-6447

LEAGUE OF UNITED LATIN AMERICAN CITIZENS
(LULAC), ET AL.,
PLAINTIFFS-APPELLEES

v.

IMMIGRATION AND NATURALIZATION SERVICE,
DEFENDANT-APPELLANT

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[1] Attorney General Barr is substituted for former Attorney General Thornburgh pursuant to Fed. R. App. P. 43(c)(1).

DECLARATION OF JAMES A. PULEO

I am James A. Puleo, Associate Commissioner, Examinations, Immigration and Naturalization Service (INS). My duties include oversight and management of the legalization program created by the Immigration Reform and Control Act of 1986 (IRCA). This declaration is submitted in support of the government's request for a stay pending disposition of these cases by the Supreme Court. The information set forth in this declaration is known to me through the course of my official duties.

1. Pursuant to stays in place since 1988, the INS has been required to grant employment authorizations and stays of deportation to members of the plaintiff classes in these cases for nearly four years beyond the original May 4, 1988 deadline for the filing of legalization applications. With the assistance of Qualified Designated Entities, INS has widely publicized information on the application process in immigration publications and ethnic newspapers.

2. The government requests (1) that it not be required to continue accepting applications and (2) that it not be required to process existing applications, pending Supreme Court action. INS will continue to extend work authorizations and stays of deportation of prima facie class members whose applications have already been received, but, for the reasons set forth below, it is critical that a stay be issued to cut off INS's obligation to continue accepting applications.

3. In the early months of the implementation of the existing stay orders, only small numbers of aliens came forward to file applications. However, since November 1989, INS has been faced with an increasing number of aliens seeking benefits under the stays.

Since the time the stays went into effect in August, 1988, nearly 300,000 applications have been received. Currently, INS is receiving an average of 1,200 applications per week.

4. At this time, INS is experiencing a major problem of fraudulent applications being filed by aliens claiming to be class members.

a. INS has found that nearly 90 percent of the applications currently being received are not from class members or are fraudulent. Although the remaining applications demonstrate prima facie eligibility, the vast majority of them will probably prove insufficient to establish eligibility when they are actually adjudicated. INS has discovered that vendors are openly selling packaged documents to ineligible aliens willing to pay the price. This is evidenced by numerous unrelated aliens appearing at the same office with nearly identical documents.

b. Fraudulent applications have imposed a significant law-enforcement burden on the Service. INS has been forced to launch a major investigative initiative to attempt to control massive third-party operations designed to defraud INS and individual aliens. By February, 1992, 40 investigations had been opened. These investigations involve 200 "facilitators" (persons who assist aliens in filing fraudulent applications) and thousands of applications. They have resulted to date in 145 arrests and/or indictments, and 42 convictions. INS's investigative section, which to date has expended over $145,000 for undercover "buy" operations, cannot begin to keep up with the level of fraud now associated with the legalization program.

c. The investigations have revealed that facilitators charge from $1,000 to $6,000 to prepare a fraudulent application for filing. (One investigation,

which resulted in the closing of a Qualified Designated Entity in Manhattan, established that they were charging $3,000 to file.) INS has witnessed a rapid growth in the number and sophistication of the perpetrators, probably due to the huge amount of money being made on these schemes. Because the employer sanctions provisions of IRCA (8 U.S.C. § 1324a) make it unlawful to hire an alien unless INS has issued employment authorization, undocumented aliens have a strong incentive to participate in these fraudulent schemes. Our investigations reveal that aliens are seldom advised that they are engaged in fraud and are rarely if ever told that this is merely the first step in a process that they have no prospect of completing.

5. In addition to the fraud problem, the sheer number of the applications threatens to consume the limited legalization program resources and paralyze INS's normal functions. The additional volume of applications is coming at a time when INS is faced with diminishing financial and personnel resources in the legalization program.

a. The legalization program was originally planned with its temporary duration in mind. Of the original 109 legalization offices staffed by 2,000 employees, only eight remain open today, and only two will be open after April, 1992. The legalization program will cease to be a distinct unit of INS at that time. Tasks relating to legalization therefore have devolved and will further devolve on ordinary district offices of INS as part of their regular functions.

b. In order to meet the demands of the *CSS* and *LULAC* applicants, district offices have had to reduce their services provided to aliens who applied for legalization during the original, congressionally-imposed filing period, and also the normal services pro-

vided to aliens in general. Of the 1.9 million section 245a aliens who applied for legalization during the original 12-month period, there are still 55,800 now scheduled for "Phase II" interviews (Phase II is the process by which an alien has his or her status adjusted from that of an alien admitted for temporary residence to that of an alien admitted for permanent residence). Another 52,400 (approximately) have been approved for Phase II but have not yet filed for adjustment, and another estimated 40,000 are still open under Phase I. While all district offices have been instructed to maintain processing of Phase II applications, they have been forced to reduce public inquiries, employment authorization extensions, advance parole inquiries, and all other services for these aliens in order to conserve resources for cases relating to *CSS* and *LULAC*. Offices have also been forced to reduce adjudicative services such as naturalization that affect aliens in general. This trend is accelerating as the influx of applications continues.

6. The financial burden of accepting legalization applications past the statutory deadline has also been very significant.

a. The legalization program was originally intended to be self-funding. INS was able to operate the program only because the application fees it generated were sufficient to cover its costs. These funds have been largely exhausted. Congress has not appropriated and is not expected to appropriate any funds for the continuing operation of legalization activities. Accordingly, the funds for dealing with *CSS* and *LULAC* applicants will have to come from reallocation of resources from other INS programs. This further impairs INS's ability to provide its normal services to aliens.

b. Under the *CSS* stay order, INS was required to accept applications without charging the normal application fee. Since about 80% of the applications filed have been filed under the *CSS* order, INS has been deprived of approximately $44,000,000 in revenue by operation of the stays.

c. The funds generated by the application fees were intended to cover the legalization program's operations prior to June 30, 1991. Because this litigation has extended the program into FY 1992, the FY 1992 budget was insufficient to meet the cost to continue the program. This will force the closure of all but two of the eight remaining legalization offices in April 1992, and the termination of many cost items such as personnel, data processing contracts, and leases (many of which are non-renewable).

7. Any requirement that INS process the legalization applications already received under the stay orders would create an even heavier burden on INS's resources and further impair its regular functions. If the Supreme Court ultimately decides the case in favor of the government, INS would be obliged to rescind adjustments previously granted, at further expense.

8. The plaintiffs' allegation that INS fails to question aliens it arrests concerning their membership in the plaintiff classes is incorrect. All field offices have been instructed to comply with this aspect of the *CSS* stay order, and this instruction is regularly reinforced. Apart from isolated instances in which a field officer errs, field officers are complying with this instruction.

9. The plaintiffs' allegation that INS denies temporary employment authorizations and stays of deportation without explanation to aliens who are clearly members of the plaintiff classes is incorrect. INS

makes every effort to comply with the provisions of the stays and to process applications as quickly as possible in a fair manner, as previously described in the September, 1990 Supplemental Declaration of Terrance M. O'Reilly filed in this Court. District offices have been instructed that when they deny an alien's claim to membership in the plaintiff classes, they should provide an explanation of the reason for the denial. Apart from isolated instances of error, district offices comply with this instruction.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 25, 1992.

/s/ James A. Puleo
JAMES A. PULEO,
Associate Commissioner,
Examinations

ATTACHMENT B1

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV S-86-1343-LKK

CATHOLIC SOCIAL SERVICES, INC.
(CENTRO DE GUADALUPE IMMIGRATION CENTER),
ET AL., PLAINTIFFS

vs.

EDWIN MEESE, III, Attorney General of the United States, DEFENDANT

ORDER GRANTING PARTIAL STAY

[Filed June 24, 1988]

PROPOSED STAY ORDER

In an Order dated April 22, 1988, following extensive briefing and argument by all parties, this Court enjoined defendants from continuing to implement 8 C.F.R. section 245a.1(g). In Orders dated May 3, 1988, the court modified the definition of subclass 1 and granted plaintiffs' motion for summary judgment setting forth detailed findings explaining why 8 C.F.R. section 245a.1(g) is inconsistent with the relevant statutory provisions of the Immigration Reform and Control Act of 1986. The court thereafter ordered and received further briefing and argument on the question of "what remedies are available to members of subclass 1 and whether a stay of this court's orders should be granted." On June 10, 1988, the court issued an Order granting relief to subclass 1 members generally requiring the readjudication of legalization applications filed by subclass 1 members in a manner consistent with the court's May 3, 1988, summary judgment order, and permitting certain subclass 1 members to file legalization applications on or before November 30, 1988. The court denied a stay of this order, *inter alia*, because "[m]embers of the subclass continue to be deported and rendered subject to voluntary departure."

On June 17, 1988, plaintiffs filed a motion to modify this Court's June 10, 1988 Order, arguing that it fails to prevent the expulsion of apprehended subclass 1 members. On June 21, 1988, on the basis of the Supreme Court's decision in *INS v. Pangilinan*, OT 1987, No. 86-1992 (June 17, 1988), defendants filed a motion to vacate that portion of the Court's June 10, 1988 Order "which relates to extending the amnesty filing deadline . . . until November 30, 1987 [sic]." Defendants also sought a stay of the same portion of the Court's May 10, 1988 Order pending disposition of their motion to vacate.

On June 23, 1988, the Court held a telephonic hearing and Ordered the plaintiffs, within ten (10) days, to file any opposition they may have to defendants' motion to vacate, and defendants, within ten (10) days, to file any opposition they may have to plaintiffs' motion to modify the Court's June 10, 1988 Order.

In this Order I resolve defendants' request for a stay pending disposition of their motion to vacate a portion of the Court's May 10, 1988 Order. For the reasons explained below, a partial stay will be issued

pending disposition of defendants' motion to vacate or further Order of the Court.

Wtihout deciding the matter, it appears to the Court that it retains the equitable power to remedy the injury caused to subclass 1 members by defendants' unlawful promulgation and implementation of 8 C.F.R. section 245a.1(g). First, *Pangilinan* appears distinguishable on several grounds: (1) the Supreme Court nowhere concludes that the statute in question in *Pangilinan* was violated by the Attorney General; here, the Court has determined that the relevant IRCA statute was clearly violated by the Attorney General; (2) in *Pangilinan* the plaintiffs had several months to apply for naturalization, more than nationals of many other countries had; here, after this Court's April 22, 1988 Order, members of subclass 1 only had a few days to apply for legalization; (3) in *Pangilinan* the Court strengthened plaintiffs' argument in this case regarding application of the equitable tolling doctrine by reference to the application deadline as a "limitations period."

Second, as stated in *Pangilinan*, this Court retains the power to issue relief in the nature of "mandamus or [an] injunction" even assuming, *arguendo*, that it does not possess the equitable power to require INS to accept and adjudicate "legalization" applications until November 30, 1988. The Court's equitable power to remedy the injury suffered by subclass 1 members may be invoked to enjoin the expulsion of class members, and permit their employment. While not granting them the right to apply for "legalization" and all of the statutory benefits attendant that status, subclass 1 members would at least receive a part of the benefit they were denied

because of defendants' unlawful regulation and practice thereunder.

The Court is informed that the parties have attempted to reach agreement on the parameters of a stay order. Defendants have agreed to stay the expulsion of any apprehended person who affirmatively indicates membership in subclass 1 for the next ten (10) days. Plaintiffs however seek a stay Order which would protect from expulsion apprehended subclass 1 members not aware of their rights as class members (i.e. requiring an inquiry by the INS prior to expulsion). For all of the reasons heretofore expressed, and to preserve the *status quo* preventing the improper expulsion of subclass 1 members pending disposition of defendants' motion to vacate, IT IS HEREBY ORDERED that:

1. Paragraphs 3, 4 and 8 of this Court's June 10, 1988 Order are hereby stayed.

2. Pending disposition of defendants' motion to vacate, and plaintiffs' motion to modify this Court's June 10, 1988 Order, defendants, their agents, employees, and successors in office shall not remove under orders of deportation, voluntary departure, or otherwise, subclass 1 members, *except* defendants may remove subclass 1 members who (1) acknowledge, in writing, that they have been advised of the temporary stay of expulsion granted by this Order and still wish to depart the country; or (2) are otherwise subject to expulsion on grounds unrelated to this litigation. In the latter category defendants shall maintain records regarding the alternative basis for expulsion.

3. Defendants shall inquire of aliens apprehended and detained regarding their membership in subclass 1. Defendants need make no inquiry of aliens

apprehended by the INS entering or attempting to enter the United States without inspection or unlawfully through a port-of-entry.

4. In its discretion, the defendants may require subclass 1 members to submit evidence regarding their membership in the class and *prima facie* eligibility for legalization, as set forth in paragraphs 4 and 10 of this Court's May 10, 1988 Order. Subclass 1 members shall be provided a reasonable time of at least twenty (20) days to obtain such evidence as may be required by defendants prior to expulsion from the country.

5. The confidentiality requirements set forth in paragraph 6 of this Court's June 10, 1988, shall apply to any information obtained by defendants from subclass 1 members pursuant to this Order.

6. Defendants shall provide all apprehended or detained aliens identified as subclass 1 members with the names and phone numbers of plaintiffs' counsel Peter Schey and Ralph Abascal, and advise such class members that they may contact plaintiffs counsel for additional information regarding their rights as class members.

IT IS SO ORDERED.

DATED: June 28, 1988

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

Presented by:

/s/ Peter A. Schey
PETER A. SCHEY
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, Jacqueline Ligua, declare as follows:

1. I am employed in Los Angeles, California. My business address is National Center for Immigrants' Rights, Inc., 256 S. Occidental Blvd., Los Angeles, CA 90057.

2. I am over 18 years of age and am not a party to this action.

3. On this day I deposited in the United States Mail in an envelope bearing the requisite postage, express mail, addressed to:

Robert Kendall, Jr.
Office of Immigration Litigation
Civil Division
Department of Justice
601 D Street, Room 8212
Washington, D.C. 20530

and by first class mail to:

Glyndell Earl Williams
Special Assistant U.S. Attorney
3305 Federal Building
650 Capitol Mall
Sacramento, CA 95814

true and correct copies of the following document(s):

1. Proposed Order Granting Partial Stay

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of June, 1988, in the city and county of Los Angeles, California.

/s/ Jacqueline G. Ligua

ATTACHMENT B2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-15046
88-15127

DC# CVS-86-1343-LKK
Eastern California
(Sacramento)

CATHOLIC SOCIAL SERVICE, INC., ET AL.,
PLAINTIFFS/APPELLANTS/CROSS-APPELLEES

vs.

RICHARD THORNBURGH, Attorney General of the
United States of America,
DEFENDANT/APPELLEE/CROSS-APPELLANT

ORDER

[Filed Aug. 22, 1988]

Before: BEEZER, Circuit Judges

The joint application for a temporary, interim stay pending disposition of the government's motion for a stay pending appeal is granted. The district court's order of June 10, 1988, is stayed pursuant to the terms and conditions of the district court's order of June 24, 1988, through and including September 1, 1988.

ATTACHMENT B3

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-15046
88-15127

DC# CVS-86-1343-LKK
Eastern California
(Sacramento)

CATHOLIC SOCIAL SERVICE, INC., ET AL.,
PLAINTIFFS/APPELLANTS/CROSS-APPELLEES

vs.

RICHARD THORNBURGH, Attorney General of the
United States of America,
DEFENDANT/APPELLEE/CROSS-APPELLANT

ORDER

[Filed Aug. 30, 1988]

Before: BEEZER, Circuit Judges

The joint application for a temporary, interim stay pending disposition of the government's motion for a stay pending appeal is granted. The district court's order of June 10, 1988, is stayed pursuant to the terms and conditions of the district court's order of June 24, 1988, through and including September 6, 1988.

ATTACHMENT B4

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-15127

DC# CV-86-1343-LKK
Eastern California

CATHOLIC SOCIAL SERVICES, INC., ET AL.,
PLAINTIFFS-APPELLEES

vs.

RICHARD THORNBURGH, DEFENDANT-APPELLANT

ORDER

[Filed Sept. 6, 1988]

Before: BROWNING and LEAVY, Circuit Judges

This court's order filed on August 30, 1988 pursuant to the stipulated stay shall remain in effect until September 21, 1988. Within eight days of entry of this order, the Appellant shall file a memorandum with this court addressing the following issues: (1) Whether the Appellant shall release, without bond, apprehended subclass 1 members prior to final disposition of this appeal; (2) Whether temporary work permits should be granted to unapprehended and/or released subclass 1 members.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-15127

DC# CV-86-1343-LKK
Eastern California

CATHOLIC SOCIAL SERVICES, INC., ET AL.,
PLAINTIFFS-APPELLEES

vs.

RICHARD THORNBURGH, DEFENDANT-APPELLANT

ORDER

[Filed Sept. 20, 1988]

Before: BROWNING and LEAVY, Circuit Judges

Appellant's motion for a stay of the district court order pending appeal is denied in part and granted in part.

The stay as stipulated by the parties which was to expire September 21, 1988 is continued until this court issues a decision on the merits.

In addition, the court orders the following:

1. Appellant shall release without bond any subclass 1 member apprehended prior to final disposition of appellant's appeal to this Court and grant such alien temporary employment authorization. Release may be denied if the INS has reasonable grounds to believe the apprehended plaintiff or class member is deportable regardless of the outcome of appellant's appeal.

2. Appellant shall grant unapprehended plaintiffs and subclass 1 members, temporary employment authorization pending final disposition of appellant's appeal in this Court.

The case is released from the prebriefing conference program.

This appeal is hereby expedited. The Clerk shall calendar this case for a November hearing in San Francisco. The briefing schedule is as follows: Appellant's brief shall be filed on or before September 30, 1988. Appellees' brief shall be filed on or before October 12, 1988. Appellant may file a reply brief on or before October 19, 1988.

APPENDIX H

8 U.S.C.:

§ 1255a. Adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful residence

(a) Temporary resident status

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien meets the following requirements:

(1) Timely application

(A) During application period

Except as provided in subparagraph (B), the alien must apply for such adjustment during the 12-month period beginning on a date (not later than 180 days after November 6, 1986) designated by the Attorney General.

(B) Application within 30 days of show-cause order

An alien who, at any time during the first 11 months of the 12-month period described in subparagraph (A), is the subject of an order to show cause issued under section 1252 of this title, must make application under this section not later than the end of the 30-day period beginning either on the first day of such 12-month period or on the date of the issuance of such order, whichever day is later.

(C) Information included in application

Each application under this subsection shall contain such information as the Attorney Gen-

eral may require, including information on living relatives of the applicant with respect to whom a petition for preference or other status may be filed by the applicant at any later date under section 1154(a) of this title.

(2) Continuous unlawful residence since 1982

(A) In general

The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.

(B) Nonimmigrants

In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.

(C) Exchange visitors

If the alien was at any time a nonimmigrant exchange alien (as defined in section 1101(a)(15)(J) of this title), the alien must establish that the alien was not subject to the two-year foreign residence requirement of section 1182(e) of this title or has fulfilled that requirement or received a waiver thereof.

(3) Continuous physical presence since November 6, 1986

(A) In general

The alien must establish that the alien has been continuously physically present in the United States since November 6, 1986.

(B) Treatment of brief, casual, and innocent absences

An alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States.

(C) Admissions

Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection.

(4) Admissible as immigrant

The alien must establish that he—

(A) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section,

(B) has not been convicted of any felony or of three or more misdemeanors committed in the United States,

(C) has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinon, and

(D) is registered or registering under the Military Selective Service Act [50 App. U.S.C. 451 et seq.], if the alien is required to be so registered under that Act.

For purposes of this subsection, an alien in the status of a Cuban and Haitian entrant described in paragraph (1) or (2)(A) of section 501(e) of Public Law 96-422 [8 U.S.C. 1522 note] shall be considered to have entered the United States and to be in an unlawful status in the United States.

(b) Subsequent adjustment to permanent residence and nature of temporary resident status

(1) Adjustment to permanent residence

The Attorney General shall adjust the status of any alien provided lawful temporary resident status under subsection (a) of this section to that of an alien lawfully admitted for permanent residence if the alien meets the following requirements:

(A) Timely application after one year's residence

The alien must apply for such adjustment during the one-year period beginning with the nineteenth month that begins after the date the alien was granted such temporary resident status.

(B) Continuous residence

(i) In general

The alien must establish that he has continuously resided in the United States since the date the alien was granted such temporary resident status.

(ii) Treatment of certain absences

An alien shall not be considered to have lost the continuous residence referred to in clause (i) by reason of an absence from the United States permitted under paragraph (3)(A).

(C) Admissible as immigrant

The alien must establish that he—

(i) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section, and

(ii) has not been convicted of any felony or three or more misdemeanors committed in the United States.

(D) Basic citizenship skills

(i) In general

The alien must demonstrate that he either—

(I) meets the requirements of section 1423 of this title (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States), or

(II) is satisfactorily pursuing a course of study (recognized by the Attorney General) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

(ii) Exception for elderly or developmentally disabled individuals

The Attorney General may, in his discretion, waive all or part of the requirements of clause (i) in the case of an alien who is 65 years of age or older or who is developmentally disabled.

(iii) Relation to naturalization examination

In accordance with regulations of the Attorney General, an alien who has demonstrated under clause (i)(I) that the alien meets the requirements of section 1423 of this title may be considered to have satisfied the requirements of that section for purposes of becoming naturalized as a citizen of the United States under subchapter III of this chapter.

(2) Termination of temporary residence

The Attorney General shall provide for termination of temporary resident status granted an alien under subsection (a) of this section—

(A) if it appears to the Attorney General that the alien was in fact not eligible for such status;

(B) if the alien commits an act that (i) makes the alien inadmissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2) of this section, or (ii) is convicted of any felony or three or more misdemeanors committed in the United States; or

(C) at the end of the thirty-first month beginning after the date the alien is granted such status, unless the alien has filed an appplication

for adjustment of such status pursuant to paragraph (1) and such application has not been denied.

(3) Authorized travel and employment during temporary residence

During the period an alien is in lawful temporary resident status granted under subsection (a) of this section—

(A) Authorization of travel abroad

The Attorney General shall, in accordance with regulations, permit the alien to return to the United States after such brief and casual trips abroad as reflect an intention on the part of the alien to adjust to lawful permanent resident status under paragraph (1) and after brief temporary trips abroad occasioned by a family obligation involving an occurrence such as the illness or death of a close relative or other family need.

(B) Authorization of employment

The Attorney General shall grant the alien authorization to engage in employment in the United States and provide to that alien an "employment authorized" endorsement or other appropriate work permit.

(c) Applications for adjustment of status

(1) To whom may be made

The Attorney General shall provide that applications for adjustment of status under subsection (a) of this section may be filed—

(A) with the Attorney General, or

(B) with a qualified designated entity, but only if the applicant consents to the forwarding of the application to the Attorney General.

As used in this section, the term "qualified designated entity" means an organization or person designated under paragraph (2).

(2) Designations of qualified entities to receive applications

For purposes of assisting in the program of legalization provided under this section, the Attorney General—

(A) shall designate qualified voluntary organizations and other qualified State, local, and community organizations, and

(B) may designate such other persons as the Attorney General determines are qualified and have substantial experience, demonstrated competence, and traditional long-term involvement in the preparation and submittal of applications for adjustment of status under section 1159 or 1255 of this title, Public Law 89-732 [8 U.S.C. 1255 note], or Public Law 95-145 [8 U.S.C. 1255 note].

(3) Treatment of applications by designated entities

Each qualified designated entity must agree to forward to the Attorney General applications filed with it in accordance with paragraph (1)(B) but not to forward to the Attorney General applications filed with it unless the applicant has consented to such forwarding. No such entity may make a determination required by this section to be made by the Attorney General.

(4) Limitations on access to information

Files and records of qualified designated entities relating to an alien's seeking assistance or information with resect to filing an application under this section are confidential and the Attorney General and the Service shall not have access to such files or records relating to an alien without the consent of the alien.

(5) Confidentiality of information

Neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may—

(A) use the information furnished pursuant to an application filed under this section for any purpose other than to make a determination on the application or for enforcement of paragraph (6) or for the preparation of reports to Congress under section 404 of the Immigration Reform and Control Act of 1986,

(B) make any publication whereby the information furnished by any particular individual can be identified, or

(C) permit anyone other than the sworn officers and employees of the Department or bureau or agency or, with respect to applications filed with a designated entity, that designated entity, to examine individual applications;

except that the Attorney General may provide, in the Attorney General's discretion, for the furnishing of information furnished under this section in the same manner and circumstances as census information may be disclosed by the Secretary of Commerce under section 8 of title 13. Anyone who uses, publishes, or permits information to be examined in violation of this paragraph shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(6) Penalties for false statements in applications

Whoever files an application for adjustment of status under this section and knowingly and willfully falsifies, misrepresents, conceals, or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) Application fees

(A) Fee schedule

The Attorney General shall provide for a schedule of fees to be charged for the filing of applications for adjustment under subsection (a) or (b)(1) of this subsection.

(B) Use of fees

The Attorney General shall deposit payments received under this paragraph in a separate account and amounts in such account shall be available, without fiscal year limitation, to cover administrative and other expenses incurred in connection with the review of applications filed under this section.

(d) Waiver of numerical limitations and certain grounds for exclusion

(1) Numerical limitations do not apply

The numerical limitations of sections 1151 and 1152 of this title shall not apply to the adjustment of aliens to lawful permanent resident status under this section.

(2) Waiver of grounds for exclusion

In the determination of an alien's admissibility under subsections (a)(4)(A), (b)(1)(C)(i), and (b)(2)(B) of this section—

(A) Grounds of exclusion not applicable

The provisions of paragraphs (14), (20), (21), (25), and (32) of section 1182(a) of this title shall not apply.

(B) Waiver of other grounds

(i) In general

Except as provided in clause (ii), the Attorney General may waive any other provision of section 1182(a) of this title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

(ii) Grounds that may not be waived

The following provisions of section 1182(a) of this title may not be waived by the Attorney General under clause (i):

(I) Paragraphs (9) and (10) (relating to criminals).

(II) Paragraph (15) (relating to aliens likely to become public charges) insofar as it relates to an application for adjustment to permanent residence.

(III) Paragraph (23) (relating to drug offenses), except for so much of such paragraph as relates to a single offense of simple possession of 30 grams or less of marihuana.

(IV) Paragraphs (27), (28), and (29) (relating to national security and members of certain organizations).

(V) Paragraph (33) (relating to those who assisted in the Nazi persecutions).

Subclause (II) (prohibiting the waiver of section 1182(a)(15) of this title) shall not apply to an alien who is or was an aged, blind, or disabled individual (as defined in section 1614(a)(1) of the Social Security Act [42 U.S.C. 1382c(a)(1)]).

(iii) Special rule for determination of public charge

An alien is not ineligible for adjustment of status under this section due to being inadmissible under section 1182(a)(15) of this title if the alien demonstrates a history of employment in the United States evidencing self-support without receipt of public cash assistance.

(C) Medical examination

The alien shall be required, at the alien's expense, to undergo such a medical examination (including a determination of immunization status) as is appropriate and conforms to generally accepted professional standards of medical practice.

(e) Temporary stay of deportation and work authorization for certain applicants

(1) Before application period

The Attorney General shall provide that in the case of an alien who is apprehended before the beginning of the application period described in subsection (a)(1)(A) of this section and who can establish a prima

facie case of eligibility to have his status adjusted under subsection (a)(1)(A) of this section and who can establish a prima facie case of eligibility to have his status adjusted under subsection (a) of this section (but for the fact that he may not apply for such adjustment until the beginning of such period), until the alien has had the opportunity during the first 30 days of the application to complete the filing of an application for adjustment, the alien—

(A) may not be deported, and

(B) shall be granted authorization to engage in employment in the United States and be provided an "employment authorized" endorsement or other appropriate work permit.

(2) During application period

The Attorney General shall provide that in the case of an alien who presents a prima facie application for adjustment of status under subsection (a) of this section during the application period, and until a final determination on the application has been made in accordance with this section, the alien—

(A) may not be deported, and

(B) shall be granted authorization to engage in employment in the United States and be provided an "employment authorized" endorsement or other appropriate work permit.

(f) Administrative and judicial review

(1) Administrative and judicial review

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

(2) No review for late filings

No denial of adjustment of status under this section based on a late filing of an application for such adjustment may be reviewed by a court of the United States or of any State or reviewed in any administrative proceeding of the United States Government.

(3) Administrative review

(A) Single level of administrative appellate review

The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of a determination described in paragraph (1).

(B) Standard for review

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

(4) Judicial review

(A) Limitation to review of deportation

There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title.

(B) Standard for judicial review

Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determination contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the

findings are directly contrary to clear and convincing facts contained in the record considered as a whole.

(g) Implementation of section

(1) Regulations

The Attorney General, after consultation with the Committees of the Judiciary of the House of Representatives and of the Senate, shall prescribe—

(A) regulations establishing a definition of the term "resided continuously", as used in this section, and the evidence needed to establish that an alien has resided continuously in the United States for purposes of this section, and

(B) such other regulations as may be necessary to carry out this section.

(2) Considerations

In prescribing regulations described in paragraph (1)(A)—

(A) Periods of continuous residence

The Attorney General shall specify individual periods, and aggregate periods, of absence from the United States which will be considered to break a period of continuous residence in the United States and shall take into account absences due merely to brief and casual trips abroad.

(B) Absences caused by deportation or advanced parole

The Attorney General shall provide that—

(i) an alien shall not be considered to have resided continuously in the United

States, if, during any period for which continuous residence is required, the alien was outside the United States as a result of a departure under an order of deportation, and

(ii) any period of time during which an alien is outside the United States pursuant to the advance parole procedures of the Service shall not be considered as part of the period of time during which an alien is outside the United States for purposes of this section.

(C) Waivers of certain absences

The Attorney General may provide for a waiver, in the discretion of the Attorney General, of the periods specified under subparagraph (A) in the case of an absence from the United States due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

(D) Use of certain documentation

The Attorney General shall require that—

(i) continuous residence and physical presence in the United States must be established through documents, together with independent corroboration of the information contained in such documents, and

(ii) the documents provided under clause (i) be employment-related if employment-related documents with respect to the alien are available to the applicant.

(3) Interim final regulations

Regulations prescribed under this section may be prescribed to take effect on an interim final basis if the Attorney General determines that this is necessary in order to implement this section in a timely manner.

(h) Temporary disqualification of newly legalized aliens from receiving certain public welfare assistance

(1) In general

During the five-year period beginning on the date an alien was granted lawful temporary resident status under subsection (a) of this section, and notwithstanding any other provision of law—

(A) except as provided in paragraphs (2) and (3), the alien is not eligible for—

(i) any program of financial assistance furnished under Federal law (whether through grant, loan, guarantees, or otherwise) on the basis of financial need, as such programs are identified by the Attorney General in consultation with other appropriate heads of the various departments and agencies of Government (but in any event including the program of aid to families with dependent children under part A of title IV of the Social Security Act [42 U.S.C. 601 et seq.]),

(ii) medical assistance under a State plan approved under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.], and

(iii) assistance under the Food Stamp Act of 1977 [7 U.S.C. 2011 et seq.]; and

(B) a State or political subdivision therein may, to the extent consistent with subparagraph (A) and paragraphs (2) and (3), provide that the alien is not eligible for the programs of financial assistance or for medical assistance described in subparagraph (A)(ii) furnished under the law of that State or political subdivision.

Unless otherwise specifically provided by this section or other law, an alien in temporary lawful residence status granted under subsection (a) of this section shall not be considered (for purposes of any law of a State or political subdivision providing for a program of financial assistance) to be permanently residing in the United States under color of law.

(2) Exceptions

Paragraph (1) shall not apply—

(A) to a Cuban and Haitian entrant (as defined in paragraph (1) or (2)(A) of section 501(e) of Public Law 96-422 [8 U.S.C. 1255 note], as in effect on April 1, 1983), or

(B) in the case of assistance (other than aid to families with dependent children) which is furnished to an alien who is an aged, blind, or disabled individual (as defined in section 1614 (a)(1) of the Social Security Act [42 U.S.C. 1382c(a)(1)]).

(3) Restricted medicaid benefits

(A) Clarification of entitlement

Subject to the restrictions under subparagraph (B), for the purpose of providing aliens with eligibility to receive medical assistance—

(i) paragraph (1) shall not apply,

(ii) aliens who would be eligible for medical assistance but for the provisions of paragraph (1) shall be deemed, for purposes of title XIX of the Social Security Act [42 U.S.C. 1396 et seq.], to be so eligible, and

(iii) aliens lawfully admitted for temporary residence under this section, such status not having changed, shall be considered to be permanently residing in the United States under color of law.

(B) Restriction of benefits

(i) Limitation to emergency services and services for pregnant women

Notwithstanding any provision of title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] (including subparagraphs (B) and (C) of section 1902(a)(10) of such Act [42 U.S.C. 1396a(a)(10)(B), (C)]), aliens who, but for subparagraph (A), would be ineligible for medical assistance under paragraph (1), are only eligible for such assistance with respect to—

(I) emergency services (as defined for purposes of section 1916(a)(2)(D) of the Social Security Act [42 U.S.C. 1396*o*(a)(2)(D)]), and

(II) services described in section 1916(a)(2)(B) of such Act (relating to service for pregnant women).

(ii) No restriction for exempt aliens and children

The restrictions of clause (i) shall not apply to aliens who are described in paragraph (2) or who are under 18 years of age.

(C) Definition of medical assistance

In this paragraph, the term "medical assistance" refers to medical assistance under a State plan approxed under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.].

(4) Treatment of certain programs

Assistance furnished under any of the following provisions of law shall not be construed to be financial assistance described in paragraph (1) (A) (i):

(A) The National School Lunch Act [42 U.S.C. 1751 et seq.].

(B) The Child Nutrition Act of 1966 [42 U.S.C. 1771 et seq.].

(C) The Vocational Education Act of 1963 [20 U.S.C. 2301 et seq.].

(D) Chapter 1 of the Education Consolidation and Improvement Act of 1981 [20 U.S.C. 3801 et seq.].

(E) The Headstart-Follow Through Act [42 U.S.C. 2921 et seq.].

(F) The Job Training Partnership Act [29 U.S.C. 1501 et seq.].

(G) Title IV of the Higher Education Act of 1965 [20 U.S.C. 1070 et seq., 42 U.S.C. 2751 et seq.].

(H) The Public Health Service Act [42 U.S.C. 201 et seq.].

(I) Titles V, XVI, and XX [42 U.S.C. 701 et seq., 1381 et seq., 1397 et seq.], and parts B, D, and E of title IV [42 U.S.C. 620 et seq., 651 et seq., 670 et seq.], of the Social Security Act (and titles I, X, XIV, and XVI of such Act [42 U.S.C.

301 et seq., 1201 et seq., 1351 et seq., 1381 et seq.] as in effect without regard to the amendment made by section 301 of the Social Security Amendments of 1972).

(5) Adjustment not affecting Fascell-Stone benefits

For the purpose of section 501 of the Refugee Education Assistance Act of 1980 (Public Law 96-122)[a] [8 U.S.C. 1255 note], assistance shall be continued under such section with respect to an alien without regard to the alien's adjustment of status under this section.

(i) Dissemination of information on legalization program

Beginning not later than the date designated by the Attorney General under subsection (a) (1) (A) of this section, the Attorney General, in cooperation with qualified designated entities, shall broadly disseminate information respecting the benefits which aliens may receive under this section and the requirements to obtain such benefits.

5 U.S.C.:

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent

jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

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